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THE INTERPRETATION OF THE EVIDENCE ACT, 1938

THE Evidence Act, 1938, has now been in operation for ten years. Although it has not produced a great volume of litigation, several problems of interpretation have arisen during this period. The cases have shown that the interpretation of the Act is not free from difficulty. In one of the early cases in which the Act was considered, Scott L.J. said that it was a 'difficult Act to construe for certain purposes, as any Act of the kind necessarily is when applied to actual circumstances'.[1] This difficulty was referred to again in one of the most recent cases, *Barkway* v. *South Wales Transport Co., Ltd.*,[2] where Asquith L.J. said that 'the construction of the Evidence Act, 1938, is not free from difficulties' It is with these problems of interpretation that this article is primarily concerned.

The Act has not inappropriately been described by Wigmore as a 'hybrid'.[3] Sections 1 and 2 deal with the admission of written statements in civil proceedings in cases in which evidence would otherwise be excluded at common law. Section 3 deals with the proof in both criminal and civil proceedings of documents which require attestation. Section 4 deals with presumptions made as to documents twenty years old in criminal and civil proceedings. Section 5 explains section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, and section 99 of the County Courts Act, 1934. Section 6 is a definition clause, and need be noted only so far as it provides that the rules relating to documentary evidence of pedigree declarations are unaffected by the Act. It will be seen from this brief summary that the Act deals with a variety of subject-matters, but we shall be concerned only with the first two sections.

These provide as follows: Section 1 (1) states that in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied: '(i) if the maker of the statement either (*a*) had personal knowledge of the matters dealt with by the statement, or (*b*) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as

[1] *Robinson* v. *Stern* [1939] 2 K.B. 260, 267.
[2] [1948] 2 All E.R. 460.
[3] *The Law of Evidence* (3rd ed. 1940), Vol. 5, p. 352.

the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters'; and (ii) if the maker of the statement is called as a witness in the proceedings, provided that this latter requirement need not be complied with if the maker is dead, or if he is physically or mentally unfit to be called, or is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have failed. Section 1 (2) provides that in civil proceedings, where the court is satisfied that undue expense or delay would otherwise result, it may dispense with the calling of the maker as a witness or may permit copies of the statement to be produced in lieu of the original document. Section 1 (3) excludes 'any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish'. Section 1 (4) requires a statement to be written by the maker or to be signed or initialled by him or otherwise recognised in writing by him. Section 1 (5) provides that for the purpose of deciding whether or not a statement is admissible under the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document or from any other circumstances, and may act on the certificate of a registered medical practitioner in deciding whether a person is fit to attend. Further, where proceedings are with a jury, the court may in its discretion reject the statement, notwithstanding compliance with the foregoing provisions, if for any reason it appears to be inexpedient in the interests of justice to admit the statement.

Section 2 (1) provides that in estimating the weight to be attached to a statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy of the statement, and shall have particular regard to the question whether the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker had any incentive to conceal or misrepresent facts. Section 2 (2) provides that statements rendered admissible are not to be treated as corroboration of evidence given by the maker of the statement.

Some indication of the beneficial results produced by these statutory modifications of the common law rules is given by the architect of the Act, Lord Maugham:

> 'During my long time at the Bar, I came across a number of cases in which the Evidence Act, 1938, had it been in force would have been of extraordinary value. I have had cases in which it was necessary to prove reports by engineers as to the value of ore deposits of various kinds in distant lands or to prove circumstances connected with landing facilities on a distant island or the value of plantations in various places,

cases where the reports would have been of extreme value, if they could have been put in evidence. It will be remembered that before the recent Act, such a report by an engineer to his own employer could never be put in evidence. The engineer in many cases could be called, but even then he could use his report only to refresh his memory, but not for any other purpose. If his memory was fairly good, and if the cross-examining counsel was fairly astute, the report would never come to the eye of the judge if it was in favour of the side on which the witness was called. If, on the other hand, the engineer was in a distant part of the world at the time of the trial, it might cost thousands of pounds to produce him as a witness, or it might be quite impossible to procure his attendance, and even if he was willing to give evidence the great cost of a commission to take evidence abroad might be necessary'.[4]

The Act therefore makes a twofold advance in the direction of wider admissibility. Subject to restrictions which will be considered later, it provides for the admission as evidence of: (1) previous written statements of witnesses, at common law, inadmissible, or at most admissible merely as notes to refresh memory[5]; and (2) documentary evidence of persons not called as witnesses, notwithstanding contravention of the hearsay rule.

The admission in appropriate cases of evidence given in previous proceedings is one illustration of the latter inroad into the common law rule.[6] So, in one of the first cases in which a court was called upon to apply the Act, *Bullock* v. *Borrett*,[7] notes made by a justices' clerk in police court proceedings of evidence given by a deceased person were held to be admissible.

The first limitation imposed by the Act upon the scope of its own operation which merits comment is that sections 1 and 2 are applicable only in civil cases. Lord Maugham in explaining this restriction writes:

> 'I thought it best to confine its operation for the main part to civil proceedings, because I knew if it were extended to criminal proceedings it would meet with opposition by some ultra-conservative lawyers'.[8]

This appears to be the sole, and we respectfully submit, a rather inadequate reason. The grounds upon which this objection would be based are presumably apprehension lest the accused should be deprived of what the English criminal law now regards as one of his fundamental rights, namely, the opportunity of cross-examining those who testify against him. Such solicitude for the accused is no doubt laudable; but the framers of the Act were apparently not unmindful of these dangers, even in civil cases, and they have

[4] 17 Can.Bar Rev. p. 481.
[5] See Phipson: *Evidence* (8th ed. 1942), pp. 461 *et seq.*
[6] For the common law rule, see *Barnett* v. *Cohen* [1921] 2 K.B. 461.
[7] [1939] 1 All E.R. 505.
[8] 17 Can.Bar Rev. 480.

provided accordingly. Section 1 (1) provides that, subject to exceptions, the maker of the statement shall be called as a witness. Availability for cross-examination is therefore the rule rather than the exception. The exceptions although mandatory in form are (except where the witness is dead) discretionary in substance in as much as they deal with matters of degree. If the Act had been extended to cover criminal proceedings it is highly improbable that an English judge would exercise either this virtual discretion, or the express discretion given to him by section 1 (2) for the purpose of admitting evidence unduly prejudicial to the accused.

Section 2 (1) affords additional protection in the shape of general principles relating to the weight to be attached to evidence admitted by the Act, and provides specifically that in no case is a statement admitted under the Act to be treated as corroborative of evidence given orally by the maker of the statement. It might be objected that there is a risk that a jury may not pay due regard to the provisions of the subsection. Such objection would be equally pertinent to the desirability of extending the operation of the Act even to civil cases where there is a jury. But it is to provide against precisely this danger that section 1 (5) gives to the judge in civil cases, and would give to him in criminal cases, an overriding discretionary power of exclusion where justice so demands. This power might be exercised in criminal cases to obviate any prejudice which might successfully have eluded all the other safeguards. It is quite clear that Lord Maugham was not entirely in sympathy with exclusion, although he framed the principle on which he would admit hearsay evidence in criminal proceedings somewhat differently.[9]

However, sections 1 and 2 apply only to civil proceedings. The type of anomaly liable to result from this restriction is illustrated by a comparison of two recent cases, which were decided within a year of each other. In *Lilley* v. *Pettit*[10] the respondent was charged with making a false statement relating to a birth contrary to section 4 of the Perjury Act, 1911. The allegedly false statement was that the father of the child was the respondent's husband, and the prosecution wished to produce regimental records relating to the husband's service to prove that he was abroad at all material times, and therefore could not be the father of the child. A Divisional Court held that these records were inadmissible, as they were not public documents, kept for the information of the public, but only for the purposes of the Crown and the executive. Lord Goddard C.J. pointed out[11] that the relevant provisions of the Evidence Act, 1938, did not affect criminal proceedings. However,

[9] 'I . . . have formed a strong opinion that any statements by a deceased person as to facts within his personal knowledge made in a criminal case before the criminal charge is made, ought to be admissible'. 17 Can.Bar Rev. 483.

[10] [1946] K.B. 401. See 63 L.Q.R. 271–2.

[11] At p. 408.

in *Andrews* v. *Cordiner*[12] the respondent, a married woman, instituted bastardy proceedings against the appellant, and it was necessary for her to prove that there was no possibility of access by her husband at the material dates. This she sought to do by producing R.A.F. service records. It was held by a Divisional Court of which Lord Goddard C.J. was a member, that the records were admissible under the Evidence Act, 1938. It is submitted that these differing results depending entirely upon the fact that in the earlier case the proceedings were criminal and in the later civil, cannot be justified on any commonsense ground.[13]

There is, however, one difficulty which arises in connection with *Andrews* v. *Cordiner*. This concerns section 1 (4) of the Act which provides that a statement in a document shall not be deemed to have been made by a person unless the material part of the document is written by the maker or is otherwise recognised by him *in writing* as one for the accuracy of which he is responsible. Section 1 (5) then provides that, for the purposes of section 1, in deciding whether a statement is admissible, the court may draw any reasonable inference from the form or contents of the document in which the statement was contained or from any other circumstances. In *Andrews* v. *Cordiner*, counsel for the appellant conceded that the regimental records came within section 1 (1) of the Act, but relied on section 1 (4), as there was no evidence of compliance with its terms. The court rejected this argument, by reference to section 1 (5). Oliver J., delivering the judgment of the court, said :

> 'How could any document have greater probability of accuracy?—that is, after all, the reason for which it is relied on. How could any document come from a more attractive source than a regimental record of this nature? There is the nature of the document, the fact that it comes from the proper custody, and the fact that it is produced by the officer having custody of it, there being no temptation on anyone's part falsely to record entries. These are matters which raise the strongest probability that the entries are true'.[14]

With respect, it is submitted that this does not adequately dispose of counsel's argument. Presumably the service records were in such form that they did not bear any evidence of the writing or the *written* recognition of the maker. And it is clear that section 1 (4) requires such authentication as a condition of admissibility. But to argue that section 1 (5) dispenses with the obligation to comply with section 1 (4) in cases in which the court is satisfied that the document is accurate and trustworthy, is to deprive section 1 (4) of meaning, because, as we have seen, that subsection requires the document to comply with specified formal requirements. Section 1 (5) can have a perfectly reasonable

[12] [1947] K.B. 655.
[13] See 63 L.Q.R. 271–2.
[14] [1947] K.B. 655, 659.

meaning apart from this. For example, from its form and contents, the court may be satisfied that the maker of a statement had a personal knowledge where that is required, or that he made the document as part of a continuous record in performance of a duty. But it is submitted that to use section 1 (5) to dispense with the requirements of section 1 (4) is unjustifiable, and further that the reasons given by the court for rejecting the argument based on section 1 (4) disregard the unambiguous terms of that subsection.[15]

It is clear that the Act confers some discretion on the court in deciding whether to admit a document. Thus, the proviso to section 1 (1) dispenses with the necessity of calling the maker of the document as a witness in certain cases. The court may exercise a discretion in deciding, for example, whether, if the witness is beyond the seas, it is not reasonably practicable to secure his attendance. Section 1 (2) gives the court a discretion to dispense with the calling of a witness if satisfied that undue delay or expense would otherwise be caused. In *Baggs* v. *London Graving Dock Co., Ltd,*[16] the court exercised this discretion. In this case, a workman, who had been subsequently called up for military service claimed compensation for injury under the Workmen's Compensation Act. The question under the Evidence Act was the admissibility of letters from a commanding officer containing statements as to the man's medical category and capacity for work. It was held that the statements were admissible under section 1 (1) (i) (*a*), as these matters were within the personal knowledge of the commanding officer. The court also dispensed with the calling of the maker as a witness under section 1 (2). Goddard L.J. pointed out that undue delay and expense would otherwise be caused. The maker was a commanding officer, and it was uncertain when and where he would be available. Moreover, he was stationed in Perthshire, and it was quite unreasonable to require the workman to go to the expense of bringing him to the court and returning him to his station.

Apart from these cases, however, the Act appears to be mandatory in its terms. Section 1 (1) states that if its provisions are complied with, the document *shall be admissible* as evidence. Having regard to this, *Infields, Ltd.* v. *Rosen & Sons*[17] causes difficulty. The plaintiffs, owners of a registered design, sought to restrain the defendants from infringement. The defendants pleaded that the design was not new and original. The plaintiffs denied this allegation, and, in support, sought to put in a statutory

[15] It is interesting to note that in *Barkway* v. *South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460, the Court of Appeal held that non-compliance with s. 1 (4) was fatal to the admissibility of a statement under s. 1 (1) (i) (*a*). Apparently no consideration was given to the possibility of dispensing with compliance with s. 1 (4) by resort to s. 1 (5). See also *Bullock* v. *Barrett* [1939] 1 All E.R. 505.

[16] [1943] K.B. 291.

[17] [1939] 1 All E.R. 121.

declaration made by a partner who was at the time of the action in Germany. Another partner was in court but was not called by either side. Simonds J. refused to admit the statement under the Evidence Act. The learned judge pointed out that there was an acute controversy of fact, and that there was a partner in court who could be orally examined and cross-examined and whose demeanour could be observed by the court. In these circumstances, Simonds J. stated that he proposed to exclude the statement in the exercise of his discretion. Phipson cites the case as illustrating the discretion of the judge in jury cases.[18] In *Cockle*, it is cited as an illustration of the discretion vested in the court by the proviso to section 1 (1) (ii) to dispense with the calling of the maker as a witness in cases where he is beyond the seas and it is not reasonably practicable to secure his attendance. In the view of *Cockle's* learned editor, this was a case in which the court refused to dispense with the calling of the witness.[19] But this was not a jury case, and therefore section 1 (5) was not applicable. Secondly, it is perfectly clear from the words of Simonds J. that he did not regard the case as an exercise of discretion under the proviso to section 1 (1) (ii), as he said:

> 'I will assume for the purposes of my ruling upon this matter that Mrs. Emma Veitch is beyond the seas and that it is not reasonably practicable to secure her attendance'.[20]

It is submitted that the only possible reason for excluding the statement might have been under section 1 (3), which renders a statement inadmissible if made by a person interested at a time when proceedings were pending or anticipated, if a dispute is involved as to any fact which the statement might tend to establish. But it is clear that Simonds J. did not even direct his mind to a consideration of this subsection. This being the case, it is submitted, with respect, that the learned judge was wrong in holding that he had any discretion to exclude the statement.[21]

One or two small points may be noted at this stage. The word 'court' in the Act is not confined to open court, so that an order may be made in chambers dispensing with the calling of the maker of a statement.[22] Furthermore an order may be made in advance of the trial of an action relating to the admissibility of evidence under the Act, and such an order may make provision for the admission of copies of the document.[23]

Two matters of considerable importance remain to be considered: the meaning of the 'maker of the statement' under

[18] *Op. cit.* pp. 264. 268.
[19] *Cockle's Cases and Statutes in Evidence* (7th ed., 1946), p. 583.
[20] [1939] 1 All E.R. 121–2.
[21] 'It is important to note that if the primary conditions are strictly complied with the admissibility of the statement is a matter of law, not of discretion *pace* a suggestion to the contrary in *Infields* v. *Rosen*.' 92 Sol. J. 533.
[22] *Friend* v. *Wallman* [1946] K.B. 493.
[23] *Edmonds* v. *Edmonds* [1947] P. 67. See also *Friend* v. *Wallman* [1947] K.B. 493.

section 1 (1) and of a 'person interested' within section 1 (3). Wigmore has said of the Act that it is not 'felicitously drafted',[24] and there is some justification for this statement so far as it relates to the definition of the maker of the statement and to the uncertainty of the relationship between sections 1 (3) and 2 (1) of the Act. The term 'maker of the statement' appears in section 1 (1) (i) (*a*) and (*b*). Section 1 (1) (i) (*a*) deals with the case of personal knowledge. That is simple enough. The difficulties have arisen under section 1 (1) (i) (*b*) which provides that the statement is admissible (all other conditions being satisfied) if the maker, where the document is or forms part of a record purporting to be a continuous record, made the statement, so far as the matters contained therein are not within his personal knowledge, in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of the matters.

This provision was first considered in *Bullock* v. *Borrett*.[25] In an action for damages for injury caused by the negligent driving of a motor car, it was sought to introduce two statements by a deceased independent witness; one, a statement made to a policeman the day after the accident and signed by the deceased witness, the other comprising notes made by a justices' clerk of evidence given by the deceased witness (though not signed by him), in police court proceedings two months after the accident. The signed statement to the policeman clearly fell within section 1 (1) (i) (*a*) and Finlay L.J. so held. The difficulty arose in connection with the second statement. In favour of its admissibility counsel argued that section 1 (4) requiring writing or written recognition did not apply to statements admitted under section 1 (1) (i) (*b*), as the witness instead of signing those statements had given evidence on oath. Counsel for the defendant argued that as the witness had not signed the statement, section 1 (4) was fatal to its admissibility, but said that the defendant was prepared to waive any objection to admissibility. Finlay L.J. after remarking that the objection had been waived, said:

> 'Looking at the Evidence Act, 1938, section 1 (1) (i) (*b*) and section 1 (4) which is the section which no doubt causes some difficulty, I think that, on the proper construction of those subsections, this note of the evidence given in a magisterial inquiry is admissible. I think that Mr. Tristram Beresford[26] was right in his argument, but I do not propose to decide anything about that. . . . If one is to look at one statement, however,[27] it is unjust that one should not look at both'.[28]

[24] *Op. cit.*, Vol. 5, p. 437.
[25] [1939] 1 All E.R. 505.
[26] Counsel for the plaintiff.
[27] The statement made to the policeman and signed by the deceased.
[28] [1939] 1 All E.R. 505, 507.

This case calls for comment on several points. In the first place, it is clear from the terms of section 1 (1) (i) (*b*) that the *maker* of the statement is the person who records it in the course of duty and obtains the information from one who has personal knowledge. In this case, therefore, the maker was the clerk. If section 1 (4) applies to such a statement, it is obviously irrelevant, for the purposes of section 1 (1) (i) (*b*), that the deceased had signed it as that would have been material only for the purposes of section 1 (1) (i) (*a*)—which deals with cases where the maker has personal knowledge. If section 1 (4) applies to cases coming within section 1 (1) (i) (*b*), the writing or signature must be that of the maker, the justices' clerk. Furthermore, notes prepared by the clerk were produced, so that it appears that the requirements of section 1 (4) were satisfied. Counsel for the plaintiff as reported, appears to have thought that the signature, if necessary, must be that of the deceased, and Finlay L.J. appears to have agreed with this contention. But, for the reasons already stated, it is submitted that this is incorrect. Moreover, it is submitted that there is no warrant in the Act for the suggestion that section 1 (4) does not apply to section 1 (1) (i) (*b*). The plain meaning of the words makes it clear that it should apply. Finally, there is some difficulty in the statement of Finlay L.J. that the document prepared by the clerk should be admitted on a principle of completeness: namely, that it would be unsatisfactory to let in the signed statement to the policeman without the other document. With respect, it is submitted that there is no justification for this. The only conceivable authority for admitting the second statement is the Act itself. Short of compliance with its terms, no principle of completeness allows the admission of a statement otherwise excluded by the hearsay rule.

The service records admitted in *Andrews* v. *Cordiner*[29] were presumably admitted under section 1 (1) (i) (*b*), and attention has already been drawn to the difficulties in that decision. In *Edmonds* v. *Edmonds*[30] evidence was admitted under this provision. The husband petitioner's case in divorce proceedings was that his wife had committed adultery with the co-respondent in India, against whom the wife had instituted bastardy proceedings on which final judgment was still pending in India. The husband sought an order for the admission in evidence at the trial of his petition of certain documents put in evidence in the Indian bastardy proceedings, including a statement sworn by a third person before a commissioner, by whom it was transcribed and signed. This statement was tendered to prove the birth of the child and that the co-respondent was the father. The Court of Appeal unanimously held that the evidence was admissible. Lord Oaksey L.J. said:

[29] [1947] K.B. 655.
[30] [1947] P. 67.

'It is contended for the co-respondent that the words in section 1 (1) (i) (*b*), . . . "in the performance of a duty to record information" are totally inapt to describe evidence before a commissioner, or I suggest, before a judge. In my opinion, although those words are wide enough to cover other forms of information which may be supplied, they still are apt to cover the evidence given by a witness either before a commissioner or before a judge. Such evidence is simply a form of information to a commissioner or to a judge, to whom it is given on oath and under the solemnity of legal proceedings'.[31]

In *Barkway* v. *South Wales Transport Co., Ltd.*,[32] the defendants' omnibus left the road owing to a burst tyre, and the crucial question in an action against the defendants for negligence was whether reasonable care had been taken in the maintenance of the tyres. The question under the Evidence Act was whether the evidence of a deceased tyre-tester employed by the defendants, given in earlier proceedings, arising out of the same accident, but with a different plaintiff, was admissible. It was clear that it was not admissible under section 1 (1) (i) (*a*) as it had not been signed by the tester. The question therefore was whether the transcript made by the reporter in the course of the proceedings was admissible under section 1 (1) (i) (*b*). In support of the argument that it was admissible, *Bullock* v. *Borrett* [33] and *Edmonds* v. *Edmonds* [34] were cited. The Court of Appeal, who were unanimous on this point, held that the evidence was not admissible. Asquith L.J. who had been a member of the Court of Appeal in *Edmonds* v. *Edmonds* considered this question in his judgment. *Edmonds* v. *Edmonds* was distinguishable in his view because there information was *supplied* to the commissioner within the meaning of the subsection, while in the instant case it could not be said that information given in court was supplied to the reporter. 'If a man dictates a letter giving information to the person to whom he is writing, it is an abuse of language to say that he is engaged in "supplying information" to his shorthand typist'.[35] *Bullock* v. *Borrett* was, in Asquith L.J.'s view, easily distinguishable, and in any event was not binding on the Court of Appeal.

It is submitted, with respect, that this unduly narrows the scope of section 1 (1) (i) (*b*). It is submitted that it is difficult to distinguish between evidence transcribed by a justices' clerk, as in *Bullock* v. *Borrett*, and evidence noted by a court reporter in the instant case. It is true that there is a difference between supplying information to a commissioner as in *Edmonds* v. *Edmonds*, and supplying it to a reporter. But it would have involved little strain on the language of the subsection if the reporter had been treated

[31] [1947] P., at p. 69.
[32] [1948] 2 All E.R. 460.
[33] [1939] 1 All E.R. 505.
[34] [1947] P. 67.
[35] [1948] 2 All E.R. 460, 473.

as a servant and part of the machinery of the court, so that information supplied to him was regarded as information supplied to the court. However, the unanimous decision of the court on this point reflects a tendency to impose a narrow construction on the scope of the Act, and it is submitted that a more liberal view of section 1 (1) (i) (*b*) would be desirable.

Finally we turn to the problem which has been most often before the courts in connection with the interpretation of the Act. This is the meaning of section 1 (3) which, as we have seen, provides that nothing in the Act shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. It should be noted that a 'person interested' is not limited to the *maker* of a document. It means, in the words of Asquith L.J., 'any person whatsoever provided that he is interested'.[36] To hold otherwise, would lead to the result that section 1 (3) would be 'largely stultified'.[37] In the case in which Asquith L.J. made this statement, *Barkway* v. *South Wales Transport Co., Ltd.*,[36] an additional ground for rejecting the transcript of the tyre-tester's evidence was that he was a person interested, although for lack of compliance with section 1 (4) he could not in any case have been the *maker* of the statement. Secondly, it should be noted that there is some difficulty in explaining the relationship between sections 1 (3) and 2 (1). The latter provides, inter alia, that in estimating the weight to be attached to a statement rendered admissible by the Act, regard should be had to the question whether the maker had any incentive to conceal or misrepresent facts. It will be seen that it may be a nice question whether a statement should be rejected outright under section 1 (3) or admitted, though treated as of little value, under section 2 (1). In *Holton* v. *Holton*[38] Barnard J. held that a statement was not excluded by section 1 (3) but stated that its weight would fall to be considered, when admitted, under section 2 (1). But apart from this case, the courts have given no consideration to section 2 (1) or to the question how far section 2 (1) affects the definition of interest in section 1 (3).

In the first case in which section 1 (3) was considered, *Robinson* v. *Stern*,[39] a young child was injured in a collision with the defendant's motor car. After the accident the defendant went to a police station, and after a caution had been administered by a police constable in accordance with the Judges' Rules, she made a statement tending to show that the accident was due to the plaintiff's fault. In answer to a question put by the judge, the defendant said that when she went to the police station, she had

[36] *Barkway* v. *South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460, 473.
[37] *Ibid.*, p. 474.
[38] [1946] 2 All E.R. 534.
[39] [1939] 2 K.B. 260.

not considered the question whether proceedings might be instituted against her. Croom-Johnson J. admitted her signed statement under section 1 (1) (i) (*a*). The Court of Appeal reversed this decision, on the ground that the defendant must have contemplated the possibility of proceedings against her after the constable's warning, and therefore she was a person interested within section 1 (3). Goddard L.J. said that the principle by which this question should be governed was that laid down by Lord Eldon in respect of the admission of various types of written statements at common law. These, Lord Eldon said:

> ' are admitted upon the principle that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth '.[40]

Goddard L.J. held that it was impossible to say in the instant case that the defendant's mind stood in an even position. To establish interest it was not necessary to show that proceedings were immediately pending or threatened. In general, Goddard L.J. deprecated the introduction of statements of this kind in running-down cases, where, in his view, they did not really assist the court in reaching a conclusion.[41]

A similar case was *Hollington* v. *Hewthorn & Co., Ltd.*[42] There an action was brought by a father, as administrator of his deceased son's estate, and on his own account, in respect of a collision between a car driven by his son and another vehicle. Owing to the death of the son, it was not possible to adduce any direct evidence of the circumstances of the accident, and the plaintiff sought to put in a signed statement by the son to a police constable after the collision, and after a warning had been given to the son that the question of prosecuting him for reckless, dangerous or careless driving under the Road Traffic Act, 1930, s. 21 (*a*) would be considered. Hilbery J. held that the case was concluded by *Robinson* v. *Stern*[43] and that the statement was excluded by section 1 (3). On appeal, counsel[44] argued that *Robinson* v. *Stern*[43] was distinguishable. There a caution was administered under the Judges' Rules, which made it clear that proceedings were anticipated, while in the instant case, the form of the warning showed only that the question of prosecution would be considered. The interesting submission was made that in a case in which the witness was alive, the question whether he anticipated proceedings could be investigated as a question of fact, but where the witness was dead, the statement should not be excluded without strict proof that proceedings were anticipated by him. The Court of Appeal, however,

[40] *Whitelocke* v. *Baker* (1807) 13 Ves. 511, 514.
[41] [1939] 2 K.B. 260, 269–270.
[42] [1943] 2 K.B. 587.
[43] [1939] 2 K.B. 260.
[44] Denning K.C.

held that this was a case within section 1 (3). Although the case was distinguishable from *Robinson* v. *Stern*, there was evidence in the form and contents of the statement made by the deceased, that he anticipated at least civil proceedings.[45]

A case of importance, in view of later references to it, is *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*[46] The plaintiffs, suppliers of a fuel economiser, sued the defendants, suppliers of a similar article, alleging breach of agreement and passing off. The question was whether a signed proof of evidence by a tester in the plaintiff's employ, who died before the hearing, was admissible. The tester's duty was to carry out tests in order to ascertain the results achieved by the plaintiff's economiser. It was held that he was a person interested within section 1 (3) and that the document was not admissible. Morton J. said:

> 'In my view, "a person interested", within the meaning of this sub-section, must, in the context, mean a person interested in the result of the proceedings "pending or anticipated". It seems to me that a useful test, though perhaps not the only one, is: was it better for Mr. Petrie that the plaintiffs should succeed in the present action or was it a matter of indifference to him?'.[47]

Applying this test, Morton J. concluded that the tester was a person interested. The object of the action was to protect the plaintiff's trade from damage. This was to the advantage of the tester, since the more economisers the plaintiff sold, the greater would be the amount of the tester's work, and his importance, so that possibly in time, if not immediately, his remuneration might be increased. The learned judge made two further points: (1) in the case of a limited company, every shareholder and every director is a person interested in the success of proceedings brought by the company; (2) he expressed no opinion as to whether a servant of the company was in every case a person interested, but the general principle underlying the act was an insistence that admissible evidence should come from an 'independent person'.[48] The learned editor of *Cockle* views this decision with some doubt, and considers that too wide a meaning was given to section 1 (3), while no attention was paid to section 2 (1).[49] However, the case and the test propounded by Morton J. have been cited with approval in subsequent cases, both at first instance and on appeal.[50]

In *Friend* v. *Wallman*[51] the question was whether two signed

[45] This decision has been strongly criticised by C. A. Wright, 21 Can.Bar Rev. p. 661.
[46] [1941] Ch. 248.
[47] *Ibid.*, at p. 250.
[48] *Ibid.*, at p. 251.
[49] *Op. cit.*, p. 585.
[50] *Bain* v. *Moss Hutchinson Line, Ltd.* [1948] 2 All E.R. 294; *Barkway* v. *South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460; *Re Hill* [1948] 2 All E.R. 489; *Evon* v. *Noble* [1948] 2 All E.R. 987.
[51] [1946] K.B. 493.

statements by American soldiers, who had since returned to the United States, might be admitted in a case in which the plaintiff had been injured in a collision. The statements were taken some months after the collision from an American soldier who had witnessed it, and from another who brought an ambulance to the scene of the accident to remove the plaintiff. The Court of Appeal held unanimously that the makers of the statements did not come within section 1 (3). As Somervell L.J. put it: ' " interest " clearly means personally interested in the result of the proceedings '.[52] *Holton* v. *Holton*[53] is an interesting case, and, although the judgment occupies only a few lines, the arguments of counsel are reported at length. In the course of divorce proceedings, a husband petitioner alleging cruelty sought to put in a statement written and signed by his mother which was prepared in contemplation of proceedings. The petitioner's mother died before the suit came on for hearing. Counsel for the petitioner argued that a person interested meant a person who has a pecuniary or other material interest in the result of the action, and who would therefore have a temptation to pervert the truth in order to serve personal or private ends, but did not include interests produced, for example, by sympathy. It was necessary to show that something would be gained or lost, before evidence was excluded under section 1 (3). In support of this restricted meaning of the subsection, counsel referred to section 2 (1). Counsel for the respondent contended that ' person interested ' should not be given so narrow a meaning. The true test was whether a person had a real interest in the result of anticipated proceedings, and no one was more concerned than a mother in such a case as the present one. The notion of interest must be given a broad meaning. Barnard J. held that the statement was admissible :

> ' If the statute had meant to exclude the statements of near relatives or relatives of the parties it would have said so '.[54]

In this context, it may be observed that it is equally arguable that if the statute had intended to confine interest to pecuniary or material interest it would have said so. The learned judge, however, made the point already referred to, that the court would have to decide what weight should be given to the statement (that is, under section 2 (1)) when its contents had been examined.

Holton v. *Holton* reflects a restrictive approach to the definition of interest. A substantially similar view was taken by Bucknill L.J. in *The Atlantic and The Baltyk*.[55] This was a case of collision in which the two defendant ships the Atlantic and the Baltyk were involved. Counsel for the Atlantic sought to read in court statements made before a notary public in New York by the master, two engineers and the lookout man of the Atlantic, a month after

[52] [1946] K.B., at p. 500.
[53] [1946] 2 All E.R. 534.
[54] (1946) 62 T.L.R. 461.
[55] (1946) 62 T.L.R. 461.

the collision. Counsel for the Baltyk opposed their admission. Bucknill L.J. held that the statements of the engineers and the lookout man were admissible, and were not affected by section 1 (3). The master's statement was, however, excluded by this subsection, as he had been in charge of the vessel at the time of the collision and might be personally liable for the damage suffered by the plaintiff ship, if negligence was proved.

This case may be compared with *Bain* v. *Moss Hutchinson Line, Ltd.*[56] An action for damages was brought by the widow of a purser who had died by asphyxiation on board ship. The plaintiff alleged that the death was due to a breach of duty on the part of the defendant in failing to provide a safe system of working on board. To support this, the defendant sought to put in signed proofs of evidence taken from the master and the second and third officers of the ship. Birkett J. refused to admit the statements, holding that all three persons were interested within the meaning of section 1 (3). The learned judge rejected the argument that interest was confined to financial interest,[57] and cited as tests of interest the judgments of Morton J. in *Plomien Fuel Economiser, Ltd.* v. *National Marketing Co.*[58] and Somervell L.J. in *Friend* v. *Wallman.*[59] The learned judge also cited *Holton* v. *Holton*[60] and *The Atlantic and The Baltyk*[61] without comment. Finally Birkett J. referred to the Merchant Shipping Act, 1894, s. 470 (1) which provides that the certificate of a master, mate or engineer may be cancelled or suspended by the appropriate authority if an inquiry establishes, inter alia, that loss or damage has occurred through their wrongful acts or defaults.

In view of the fact that Birkett J. rejected the test of financial interest, it is a little odd that he referred to the judgment of Barnard J. in *Holton* v. *Holton*[62] without adverse comment. In the later case of *Evon* v. *Noble*,[63] Birkett J. observed that Barnard J. had in *Holton* v. *Holton*[62] accepted without comment counsel's suggestion that interest be confined to financial or material interest. In *Evon* v. *Noble*, Birkett J. excluded a statement in a case in which he expressly stated that no financial interest was involved. A child had been left in the care of a domestic servant and suffered injury while playing. It was alleged that the injury was caused by the negligence of the defendant, a chemist, in leaving acid in a container to which the child had access. After a writ had been issued against the defendant, the domestic servant had made a written statement concerning the accident, and at the

[56] [1948] 2 All E.R. 294.
[57] *Ibid.*, at p. 296.
[58] [1941] Ch. 248.
[59] [1946] K.B. 493.
[60] [1946] 2 All E.R. 534.
[61] (1946) 62 T.L.R. 461.
[62] [1946] 2 All E.R. 536.
[63] [1948] 2 All E.R. 987.

date of the hearing she could not be traced. Birkett J. held that the statement was excluded by section 1 (3). He also cited the judgment of Morton J. in *Plomien Fuel Economiser, Ltd.* v. *National Marketing Co.*[64] Birkett J. said of that judgment:

> 'I suppose that that really means a person who has no temptation to depart from the truth on one side or the other—a person not swayed by personal interest, but completely detached, judicial and impartial'.[65]

This last appears far removed from that of Barnard J. in *Holton* v. *Holton.*[66] Applying such a test Birkett J. concluded that the servant was a person interested, as her reputation for care in minding a child was in issue, though he observed that this was not a financial interest.

Two more cases bear on the interpretation of section 1 (3). In *Barkway* v. *South Wales Transport Co., Ltd.*,[67] which has already been discussed in other connections, it was held by the Court of Appeal, following *Plomien Fuel Economiser, Ltd.* v. *National Marketing Co.*,[68] that the tyre-tester was a person interested as his reputation as a tyre-tester was involved, and as he was also interested in the success of his employer's case. In *Re Hill*,[69] Wallington J. held that a solicitor's clerk was not a person interested within section 1 (3). In anticipation of probate proceedings in respect of the validity of a will which was propounded by a partner in a firm of solicitors, as one of the executors, the clerk, an employee of the firm, prepared a statement of the evidence he would be able to give at the trial, but died before the action was commenced. Wallington J. referred to the question left open by Morton J. in the *Plomien Case* whether a servant of a company involved in litigation was always a person interested. The learned judge concluded that it would be wrong to hold that the evidence of such a servant should be excluded in every case by section 1 (3). Wallington J. then proceeded to state that financial interest, direct or indirect, was not the sole criterion of inadmissibility on the ground of interest. In the instant case, the clerk clearly contemplated proceedings, and there was no doubt that the firm were interested that everything proper should be done to secure the victory of their clients, or that the servants of the firm were anxious to secure the best possible result in the interests of the firm. Nevertheless the result of the proceedings would not affect the reputation, prestige or financial stability of the firm or the partner. In the view of the learned judge, therefore, the statement was not excluded on grounds of interest.

[64] [1941] Ch. 248.
[65] [1948] 2 All E.R. 987, 989.
[66] [1946] 2 All E.R. 534.
[67] [1948] 2 All E.R. 460.
[68] [1941] Ch. 248.
[69] [1948] 2 All E.R. 489.

In *Evon* v. *Noble* [70] Birkett J., looking back at the line of cases concerned with the interpretation of interest, said that 'no comprehensive category of persons interested has been made'. In the present state of the authorities, only tentative conclusions may be expressed. It now seems reasonably clear that financial or material interest is not an exclusive test. Moreover it would be illogical and unreasonable to limit the definition of interest in this way. In view of this, it may be doubted whether *Holton* v. *Holton* [71] would be followed, because of the strength of the interest of the maker of the statement in that case. The cases seem to suggest that a person interested within section 1 (3) is a person with a substantial interest in the outcome of the proceedings. A case like *Re Hill* [72] may be explained on the footing that although the solicitor's clerk may have had some interest in the outcome of the proceedings, that interest was not sufficiently substantial to call for its exclusion under section 1 (3).

Such an interpretation of 'person interested' is, in our submission, supported by the terms of the Act. Reference has already been made to section 2 (1) which, inter alia, directs the court to have regard to the possibility of an incentive on the part of the maker of an admissible statement to conceal or misrepresent facts, in assessing the weight to be accorded to it. If these words in section 2 (1) are to have any meaning, it follows that some limitation must be imposed on the scope of section 1 (3). If not, then any interest would exclude a statement, and no question of weight would ever arise. It would seem reasonable, therefore, to interpret interest in section 1 (3) as meaning substantial interest, although that, in itself, is not a very precise criterion. However, it is manifestly impossible to discover in the present state of the authorities, any clearer or more precise measure of interest for the purposes of section 1 (3).

Some doubt may be expressed as to the desirability of the inclusion of section 1 (3) within the framework of the Act. Without it there are adequate safeguards. There is, in the first place, section 2 (1). Under this subsection, the court could without recourse to section 1 (3) give little or no weight to a statement. It may be objected that section 2 (1) would not provide sufficient protection in a jury case. But here there is ample protection accorded by section 1 (5), which, it will be remembered, gives the court a discretion to exclude a statement in jury cases. In view of these facts, it may be doubted whether the insertion of section 1 (3) does not interpose an unnecessary restriction upon the admission of statements in evidence.

Zelman Cowen.
P. B. Carter.

[70] [1948] 2 All E.R. 987, 988.
[71] [1946] 2 All E.R. 534.
[72] [1948] 2 All E.R. 489.

EPITHALAMIUM—A SCOTTISH TRILOGY

The implications of the House of Lords decision in *Weatherley* v. *Weatherley* [1947] A.C. 628, that refusal of sexual intercourse per se does not in England amount to desertion, have been ably and exhaustively analysed by Professor L. C. B. Gower in M.L.R., Vol. 11, 2, 176, and also by Mr. Jasper Ridley in 64 L.Q.R. 243. A brief postscript on three recent Scottish decisions on refusal of marital intercourse as constituting desertion may be of some general interest. In the articles in *The Modern Law Review* and *The Law Quarterly Review* reference was made to the Scottish practice which, in contrast to that of England, conceded, on the authority of *Goold* v. *Goold* 1927 S.C. 177, that refusal by one of the spouses to allow the other to have sexual intercourse during the quadriennium (now triennium) might amount to desertion. When *Goold* was decided, the Scottish law of desertion was based upon the Act of 1573. Until recently the Scottish courts have apparently not had to consider whether the Divorce (Scotland) Act, 1938, had altered the law as stated in *Goold*—a point rather overlooked by some learned writers in the South. In *Bell* v. *Bell* 1941 S.C.(H.L.) 5 and *Wilkinson* v. *Wilkinson* 1943 S.C.(H.L.) 61—neither case being concerned with refusal of marital intercourse—the House of Lords had to consider whether the 1938 Act made a fresh point of departure for construing the law of desertion in Scotland. There was a cleavage of opinion, Lord Thankerton and Lord Macmillan, the Scottish Law Lords, favouring the view that desertion under the 1938 Act was to be construed in the light of previous practice.

The recent trilogy of Scottish decisions, *Burrell* v. *Burrell* 1947 S.C. 569, *Lennie* v. *Lennie* 1948 S.C. 466, and *Macdonald* v. *Macdonald* 1948 S.L.T. 380, have re-affirmed that refusal of marital intercourse may still constitute desertion according to the law of Scotland. It is true that in the first case of the trilogy—*Burrell*—a decision of the Inner House, the Lord President (Cooper) in an obiter dictum seems to have felt some difficulty as to the extent to which the rule in *Goold* was still applicable to the post-1938 law of divorce; but neither Lord Carmont nor Lord Keith seems to have felt anxiety in this respect. In *Lennie*, another decision of the Inner House, but this time of the Second Division, the court (Lord Jamieson being absent) held unanimously that the rule in *Goold* was still the law of Scotland. In neither *Burrell* nor *Lennie*, however, did the pursuer succeed; but in *Macdonald*, a decision of Lord Mackintosh delivered in the Outer House, decree of divorce for desertion by refusal of sexual intercourse was actually

granted—somewhat remarkably, so far as can be ascertained, for the first time in a reported case. It deserves note that the same learned judge who granted decree in *Macdonald* was sustained by the Inner House in the earlier case of *Burrell* where he had refused decree.

It is doubtful whether some learned writers in sister systems of jurisprudence realise the difficulty of discharging the onus of proof required to satisfy a Scottish court in the class of case under discussion. The pursuer has to steer his case between the Scylla of ' unwillingness to adhere during the triennium ', on the one hand, and the Charybdis of ' acquiescence ' on the other. Further, evidence of refusal of sexual intercourse requires strong corroboration; and, until the decision in *Lennie*, it was widely considered to be the law of Scotland that, if the spouses shared the same bed or room, they could not be heard to say that intercourse had not taken place. The standard of proof required by Scottish courts in cases such as *Goold* has been rightly described as ' exacting '.

In *Goold* the pursuer averred that the defender had refused him sexual intercourse for twenty years until, in the end, he left the conjugal home; and that the defender had insisted on occupying a separate bedroom. He failed because the long delay which had elapsed before he brought his action raised a presumption of acquiescence. The judges delivered conflicting dicta as to how and when the pursuer was bound to emphasise his disapproval of the defender's conduct by breaking off cohabitation. In *Burrell* the pursuer alleged desertion by the defender, whom he averred had refused him sexual intercourse from (at latest) June, 1940, until June, 1943. The Lord President, however, in his opinion showed that there was not even three years withdrawal by the defender without the consent of the pursuer. The latter had taken the initiative in moving to a separate bedroom, and had not protested when marital relations ceased in 1938. The pursuer had consented to such cessation until June, 1940, whereafter the parties lived apart by mutual consent for fifteen months; and from 1944 till May, 1945 (when the action was brought), the parties were in negotiation for a voluntary separation. Thus, even if the rule in *Goold* remained good law, and it was accepted as such by at least two of the judges sitting, the pursuer was bound to fail on ordinary standards of proof. In *Lennie* the wife pursuer averred that she was married to the defender in June, 1939, and that after August of the same year he had refused to have sexual intercourse with her until August, 1946, when she left him. For most of this time they had shared the same bedroom, and for part of the time they had shared the same bed. In addition to her own testimony she called medical evidence tending to support her contentions, proved an unqualified admission by the defender, and also contemporaneous complaints by herself to her solicitor and friends. The Lord Ordinary (Sorn) refused decree on the grounds that, in the

circumstances, evidence by the spouses to the effect that no sexual connection had taken place was incompetent. The pursuer reclaimed (Anglice—appealed), contending that there was no such rule of evidence known to the law of Scotland. The Second Division of the Inner House, in exhaustive and careful opinions, rejected the alleged rule of evidence on which the Lord Ordinary had based his decision, but held by a majority of two to one (the Lord Justice-Clerk dissenting) that the pursuer had not discharged the heavy onus of proof applicable to such cases, either in corroborating evidence of refusal of intercourse or in establishing non-acquiescence during the triennium.

Two excerpts from the dissenting opinion of the Lord Justice-Clerk (Thomson) indicate the gist of his views on the competency and sufficiency of the evidence adduced in *Lennie*. On competency he said: 'It is difficult to see why if disclosure is so contrary to public interest, it should be permitted in cases other than desertion. But a more formidable objection is that there seems no reason why there should be anything more sacred than the ascertainment of truth and the doing of justice. Another serious difficulty is that of defining the circumstances giving rise to the incompetency. I could understand a rule which said that any evidence dealing with the sexual relations of spouses is incompetent. That would be a rule general in application and logical in principle. But a rule which is limited to excluding evidence when and only when the spouses occupy the same bed seems to me to be entirely unsuited to present-day conditions. There are many marriages nowadays where the parties have sexual intercourse fully and normally yet habitually occupy separate beds in the same room. It seems impossible to apply a different rule to such married couples and, if that inroad is made, what is to happen when the parties use adjoining rooms with communicating doors, separate rooms on the same floor and so on. Accordingly I reach the conclusion that there is no rule such as the Lord Ordinary accepts which is binding on this court and I can see no justification for attempting to introduce such a rule'. On the onus of proof he said: 'I agree that in matters of this kind the burden of proof is a heavy one. It can fairly be put, as Lord President Clyde put it in *Goold* v. *Goold*, as a presumption which has to be rebutted. But I do not think that it would be creditable to the law if, after saying that the remedy was available, and that the evidence of the spouses was competent, it went on to say that the burden of proof was so heavy as to be virtually impossible of discharge. The evidence necessary to discharge the burden must have some practical relation to the circumstances of the case'. Lord Mackay, in whose opinion Lord Stevenson concurred, shared the Lord Justice-Clerk's views that there was no rule of law which rendered inadmissible evidence that spouses who had shared the same room or bed had not had intercourse; but in his view the pursuer had acquiesced, albeit

reluctantly, in the defender's refusal of intercourse. Further, he considered that there was not to be found in the alleged admission by the defender; complaints by the pursuer to third parties; nor in the medical evidence that 'there had not been *regular* intercourse'; any such substantial corroboration, amounting to independent testimony, as the law demanded.

The third case of the trilogy—*Macdonald*—first came before Lord Mackintosh for proof in December, 1947; the law was argued before him in June, 1948, and the Inner House decisions of *Burrell* and *Lennie* were cited to him. The pursuer averred that in the year 1943, when he was on leave from the R.A.F., his wife absolutely refused to allow him to have sexual relations, and that thereafter he found conditions so unbearable that he rejoined his unit before his leave had expired. From that time he was frequently home on leave to his house in Glasgow, where his wife and children were living, until September, 1945, when he was demobilised. Throughout this period, and until Christmas, 1946, he attempted to persuade the defender to live a normal married life, showing her, moreover, that her attitude was entirely against his wishes. About Christmas, 1946, he ceased his protests, having by then decided that there was no likelihood of her changing her attitude. He had re-enlisted in the R.A.F. in April, 1946, and when he gave his evidence in December, 1947, was on embarkation leave, living at the house where his wife and children still resided. The pursuer's evidence was corroborated by his son and daughter (aged nineteen and seventeen respectively). Their evidence was to the effect that the defender had refused to share a room with the pursuer; had insisted on the daughter sleeping with her when the pursuer was in the house; and had paid little attention to him when he was in the house, leaving him to cook his own food and setting no place for him at meals. In these circumstances Lord Mackintosh, in a careful opinion, held that there was sufficient proof of refusal by the defender of intercourse and of non-acquiescence by the husband pursuer maintained throughout the triennium. In the course of his opinion the learned Lord Ordinary said: 'In such a case as this there was no cohabitation at board, far less at bed, and the joint life (if life under the same roof on such terms can be called joint life at all) does not raise the same presumption of acquiescence which I think that the ordinary cohabitation at board which existed in *Goold's* and *Burrell's* cases might do'.

It is understood that *Lennie* may be appealed to the House of Lords. In *Weatherley* v. *Weatherley* Lord Normand and the Lord Chancellor gave express warning that their decision in that case was on the English law of desertion, and that the citation of Scottish decisions on divorce in an English case or vice versa can seldom be profitable. The question as to whether refusal of sexual intercourse constitutes desertion in Scotland has never been directly before the House of Lords, and has only been indirectly so in *G.* v.

G. 1924 S.C.(H.L.) 42, when Lord Dunedin expressed somewhat unfavourable obiter dicta. Thus, two major issues may be before the House of Lords for determination :—

(a) May refusal by one spouse of sexual intercourse against the wishes of the other constitute desertion under the Divorce (Scotland) Act, 1938?

(b) Is it permissible in a Scottish action for divorce on these grounds 'to discover or reveal the intimacies of the marriage bed'? (In *Weatherley* v. *Weatherley* Viscount Jowitt L.C. considered such a course undesirable in England, except where statute clearly enjoined such a course.)

The answer to the first question has been given affirmatively by the Court of Session in the three recent decisions considered in the present article. The Second Division in *Lennie* also answered the second question in the affirmative. Though this was contrary to the opinion generally prevailing, Guest K.C. for the pursuer, in a masterly distinguishing of the authorities, exposed with a skill reminiscent of surgery, the healthy from the unhealthy growths in the law of Scotland. He demonstrated that the current misconception was based on one Outer House decision and on confusion between the question of competency and of weight of evidence in a number of others. In *Burman* v. *Burman* 1930 S.C. 262 the Court of Session rejected the application of the rule in *Russell* v. *Russell* to Scotland (see also *Marchant* v. *Marchant* 1948 S.L.T. 143); in *Lennie* v. *Lennie* the Second Division rejected the suggestion that public policy should limit the investigation by the court of the intimacies of the marriage bed, though it was accepted that caution must necessarily be observed in weighing the evidence of the spouses themselves.

There may be many, trained in other systems of jurisprudence than of Scotland, who will be ready to concede that the solutions found by the Scottish Courts to the matrimonial problems discussed, show both clear thinking and sound common sense. The decision of the House of Lords in *Lennie*, if the appeal be taken there, will be awaited with anxiety and interest.

T. B. Smith.

THE U.S. SUPREME COURT AND RELIGIOUS FREEDOM

THE First Amendment [1] to the U.S. Constitution guarantees freedom of religion from interference by the Federal Government. The Fourteenth Amendment [2] extends this freedom by prohibiting the separate States from abridging the freedom of citizens [3] of the United States. This extension to cover the area of State action was not explicitly made by the Supreme Court. It has been assumed.[4] Thus neither the Federal Government nor the States may penalise or subsidise religion and in States with compulsory education laws parents have a right to educate their children at their own expense, in private or religious schools.[5]

The State must assume an attitude of neutrality between religion and non-religion. But neutral action must not be susceptible to interpretation as anti-religious action. The position is not the simple one of remaining neutral between the equal forces of militant religion and militant anti-religion. It is the difficult one of remaining neutral between organised forces of religion backed by unorganised social forces of a generally pro-religious character, and the unpopular minority in society who feel that especial sympathy for religion will subvert the whole lay spirit of the American Constitution. The Supreme Court must maintain the 'wall of separation between church and state' even if in deciding cases that wall become, in Justice Jackson's phrase, 'as winding as the famous serpentine wall designed by Mr. Jefferson for the university he founded'.[6]

In the last decade the small sect known as 'Jehovah's Witnesses' has brought many cases to the court for decisions on the rights of organised religion under the Constitution. The court has been required to define the limits of State action under the 'police power', more specifically, the rights of popularly elected legislative bodies to limit the area of freedom guaranteed by the First Amendment. The cases cover a variety of civil liberties issues; sale of

[1] 1791. 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.

[2] 1868. Section I.

[3] Including, generally, resident aliens.

[4] In *Gitlow* v. *New York*, 268 U.S. 652 (1925). '. . . this case assumes that a reasonable freedom of expression is part of the liberty which the States are forbidden to take away without due process of law'. Cushman, R. E., *Leading Constitutional Decisions* (1937) p. 85.

[5] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

[6] Concurring in *McCollum* v. *Board of Education*, S.Ct. Law Ed. Adv. opinions. Volume 92, No. 11, p. 451 (March, 1948).

literature; solicitation of funds; ringing of doorbells and parades; as well as more fundamental issues concerning the collision of individual consciences with the purposes of organised government. In two recent cases, not involving the Witnesses, decisions have been given on the use of public funds for religious purposes.[7]

It helps but little in the understanding of these cases to describe certain decisions as 'liberal', others as 'conservative'. In a very real sense, the whole court is liberal. It is probably the first Supreme Court in modern times which does not lag behind Federal or State legislators in its sympathetic understanding of the problems of modern industrial society. But judicial liberalism is composed of two parts. A belief in the long-term value of Justice Holmes' concept of judicial 'self-restraint', ably expounded today by Justice Frankfurter,[8] and a belief that the Bill of Rights must be preserved in its literalness from the attacks of legislators. There is an inevitable conflict between these two viewpoints, which is nothing more than a reflection of the nature of the American Constitution. American constitutional democracy is based on the inalienable civil liberties of the written constitution, and the elective principle in government. The 'sovereign people' cannot be sovereign if certain subjects are outside their legislative ambit.[9] This difficulty in interpretation of the Constitution is frequently resolved by the use of the 'clear and present danger' doctrine[10] where this is applicable. When danger to the State is not in question the court now recognises, often reluctantly, the reality of those powers which must be allowed an elected legislature in order that it may perform the essential duties of government,[11] or put into operation a reform the main outlines of which do not conflict with the spirit of the Bill of Rights.[12] But it could be said, not unfairly, that the court tends increasingly to eschew well-worn constitutional theory and to apply itself to a consideration of the social reasons and social effects involved in the legislation it examines. The 'wisdom' of the statute is in fact under review. In such cases, *i.e.*, when the justices find themselves discussing what are essentially matters of political theory and public policy the logic of decided cases is frequently an unwelcome and oft ignored intrusion. They are more interested in the probable results.

[7] *Everson* and *McCollum*, *infra*.
[8] Especially in the *Gobitis* and *Barnette Cases*, *infra*.
[9] See Justice Jackson's opinion in *W. Va. Board of Education* v. *Barnette*, 319 U.S. 624 (1943).
[10] *Schenck* v. *United States*, 249 U.S. 47 (1919). *Abrams* v. *United States*, 250 U.S. 616 (1919).
[11] *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). Civil rights of American citizens of Japanese racial origin. See also 'The Supreme Court and the Capacity to Govern'. Vincent. M. Barnett, Jr. *Political Science Quarterly*, September, 1948.
[12] *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (1945). Rights of voluntary associations in the State.

RELIGIOUS PROPAGANDA

The early exponents of American democracy were concerned to outlaw from American life the civil strife resulting from the establishment of a State Church. They abhorred the idea of test oaths and other devices for producing religious conformity. Madison and Jefferson in particular fought against the establishment of religion. They succeeded, both in their own state of Virginia and in the Federal Constitution, in writing laws making such establishment illegal. They were equally concerned that no restraints should be put on the freedom of religious expression, but they could not have foreseen that, in present conditions, the right to persuade others to one's views by the devices of modern publicity involves the right to annoy unbelievers in the peaceful acceptance of their unbelief. The modern town dweller is frequently not the inquiring, gregarious, political animal of eighteenth century theory. After his day's labours he wishes to be left alone in his ignorant bliss and if necessary will get his town to pass laws to that end.[13] But Jehovah's Witnesses have the ancient zeal. Their methods of propaganda are unorthodox. They are offensive, not defensive, in face of competing creeds. They are all ordained ministers in their own Church. The essence of their faith is proselytising. Their firm obedience to divine law [14] results in their making their own selection of those civil laws they can obey. As religion to them *is* proselytising, a restriction on the use of any particular method of propaganda is seen as a denial of their religious freedom. Being peculiarly impervious to public opinion, their activities have frequently conflicted with the ordinances of local authorities designed under the ' police power ' to preserve the good order and welfare of the community.

The city of Griffin [15] (Georgia) had an ordinance forbidding the distribution of literature without a permit. The Witnesses contested the validity of the regulation under the First and Fourteenth Amendments on the grounds that it was a violation of freedom of religion and of the press. As ' amicus curiae ' the American Civil Liberties Union urged that, ' The guarantees of freedom of speech and of the press prohibit prior censorship by any method whatsoever '. The Supreme Court invalidated the ordinance on the grounds that this type of legislation could restore licensing and censorship in its baldest form. The ordinance cannot be saved because it relates to distribution and not to publication.[16] In the words of Chief Justice Hughes, ' Liberty of circulation is as essential to that freedom as liberty of publishing . . . indeed without the circulation the publication would be of little value '. This freedom

[13] *Martin* v. *Struthers*, 319 U.S. 141 (1943).
[14] Exodus XX, 3–5.
[15] *Lovell* v. *Griffin*, 303 U.S. 444 (1938).
[16] Cf. *Near* v. *Minnesota*, 283 U.S. 697 (1931).

of distribution for the Witnesses was upheld again in *Marsh* v. *Alabama*[17] and *Tucker* v. *Texas*.[18]

In the case of *Cantwell* v. *Connecticut*[19] to the question of State censorship of this sort was added the consideration of public peace consequent upon Cantwell's method of canvassing. Cantwell had canvassed from door to door soliciting funds without possessing the necessary authorisation from the Public Welfare Council of the State. It was argued for Connecticut that such a certificate of authorisation from the State was necessary to protect householders from fraud. The secretary of the Public Welfare Council had power to grant or revoke certificates. This, too, in the court's view was prior censorship because the secretary ' is authorised to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth '.[20] Cantwell's methods of solicitation were questioned. He carried a gramophone on which records were played to potential customers. The records described the literature of his faith and vilified other brands of religion, especially the Roman Catholic. It was stated that this method had been used in a certain Cassius Street where 90 per cent. of the residents were Catholics, under conditions liable to lead to a breach of the peace. Justice Roberts considered the point but said that as Cantwell had moved on when it was suggested to him, his action ' considered in the light of constitutional guarantees raised no such clear and present menace to public peace and order as to render him liable to conviction '. The rights of the Witnesses were upheld.

Some check was, however, put on the Witnesses' freedom of expression when through Justice Murphy the court declared that ' Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the court '.[21] Chaplinsky, a Witness, on being led away after a disturbance had said to the city-marshal, ' You are a God-damned racketeer and a damned Fascist and the whole Government of Rochester are Fascists or agents of Fascists '. Nor was it unreasonable in the court's view for New Hampshire[22] to demand of the Witnesses a fee for parades,[23] graded according to the size of the parade and the number of police detailed for duty.

[17] 326 U.S. 501 (1946). In a company town and contrary to the wishes of the town's management.
[18] 326 U.S. 517 (1946). In a national defence housing project on United States'-owned land.
[19] 310 U.S. 296 (1940).
[20] Justice Roberts for the court.
[21] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).
[22] *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).
[23] In which banners were carried bearing the slogans ' Serve God and Christ the King ', and ' Religion is a Snare and a Racket '.

The right of the Witnesses to be free from the requirement that they obtain a licence to canvass was again upheld by the court in *Douglas* v. *Jeannette*,[24] but not without searching questions being raised by Justice Jackson in a separate opinion concurring in the result. The danger is twofold. Firstly, that in granting a wide area of freedom to religionists the court may be giving special privileges to those who claim to speak in the name of religion. Secondly, as regards the methods of propaganda used by the Witnesses, Justice Jackson said, 'If each competing sect in the United States went after the householder by the same methods, I should think it intolerable. Can we give to one sect a privilege that we could not give to all?' Limits must be fixed with an eye to the widest freedom to proselytising pressures. 'We have held that a Jehovah's Witness may not call an officer a "God-damned racketeer" and a "damned Fascist" (Chaplinsky), how then can the court today hold it a high constitutional privilege to go to houses, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their Church a "whore" and their faith a "racket"?'

Religious liberty may be a nuisance and a town can suppress nuisances, as was argued by the town of Struthers,[25] Ohio, when it unsuccessfully defended the validity of its ordinance prohibiting canvassers from ringing doorbells when distributing literature. The ordinance seemed reasonable, as many citizens worked a night shift in the steel mills and slept by day. The court, however, held the ordinance invalid[26] as it did not discriminate between those householders who were and those who were not willing to receive the literature. Justice Reed, dissenting, held that the ancient right of colportage did not give canvassers any inalienable right to annoy the citizens of Struthers. But when another law, the Massachusetts child labour law, was infringed by the Witnesses, because Betty Simmonds, aged nine, had been taken out to sell literature, the court agreed with Massachusetts that an offence had been committed. In Justice Jackson's words, 'All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the State'.[27]

Freedom to distribute literature is guaranteed by the First Amendment. This freedom must be carefully guarded when the distributors are personnel of a small and unimportant organisation. But few, if any, propaganda bodies nowadays are so weak, or for that matter, so wealthy, that they have no need of a sales mechanism by which to pay for their publications.

Pamphlets are, traditionally, the poor man's press but there is no evidence that freedom for this poor man's press has depended

[24] 319 U.S. 157 (1943).
[25] *Martin* v. *Struthers*, 319 U.S. 141 (1943).
[26] Relying on *Lovell* v. *Griffin* and *Schneider* v. *Irvington*, 308 U.S. 147 (1939).
[27] *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

on the literature being distributed gratis. Tom Paine's pamphlets were sold to the public, not given away. An interesting position arises when a religious propaganda body seeks to deny that its sales of literature constitute a business transaction. Businesses, including publishing, are subject to taxation, licence and control. The methods of, and reasons for control are varied.[28] But the press is not excluded from the social policies applied to industry as a whole. To the newspaper magnate 'free enterprise' and 'freedom of the press' are often, editorially, identical, but to courts and legislators they are separate issues.[29] The Supreme Court has even held that the anti-trust laws can be used in the interests of the newspaper-reading public to prevent a supply of news being 'monopolised' by the press association which gathers it.[30] Publication is a business and can be regulated. But is the sale of religious literature to be considered as a 'spiritual' matter which cannot be regulated or a commercial one which can? To the atheist the solution is simple. Religious publication is merely one of the many forms of business activity which the modern State has a right to control. But the American Constitution is not atheistic, it is neutral. Freedom of the press is not unlimited, but can the freedom for religious publication be made wider than that for ordinary political publication when words of the First Amendment give equal emphasis to freedom of religion, speech, press and assembly?

It was while considering the matter of religious publication [31] that three members of the court stated that in their opinion the now famous *First Flag Salute Case* [32] had been wrongly decided. The court therefore vacated judgment in *Opelika* and re-argued the case in connection with *Murdock* v. *Pennsylvania*.[33] In *Opelika* (for the court) and later in *Murdock*, dissenting, Justice Reed took the view that a Witness acting as a book agent for the publications emanating from the Witnesses' publishing house (Watch Tower Bible and Tract Society), was engaged in business activity for which the city could reasonably exact a licence fee. 'To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles'. (The books were supplied at wholesale prices and sold at retail prices.) The First Amendment does not give freedom from all taxation. In effect, the community is subsidising the sales of religious literature by exempting the business activities of the Witnesses from the general costs of government. This is frequently done in respect of religious activities, but only as an act

[28] See, *e.g.*, *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).
[29] *Associated Press* v. *National Labour Relations Board*, 301 U.S. 103 (1937)—collective bargaining.
[30] *Associated Press* v. *United States*, 326 U.S. 1 (1945)—an anti-trust suit.
[31] *Jones* v. *Opelika*, 316 U.S. 584 (1942).
[32] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940).
[33] 319 U.S. 103 (1943).

of grace on the part of the community. There is no constitutional right to tax exemption for religious bodies. The possibility of misuse does not make a tax unconstitutional.[34] 'The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods'. In *Murdock*, Justice Frankfurter also dissented, asserting that, 'It will hardly be contended . . . that a tax on the income of a clergyman would violate the Bill of Rights. . . . A clergyman, no less than a judge, is a citizen', and must pay his share of the costs of government. But the majority of the court took the view that, although certain aspects of distribution entailed 'commercialism', this did not transform evangelism into a business enterprise. If it did the passing of the plate in church would become a commercial project. Justice Murphy, with the majority of the court, noted that a licence fee had never been required of other clergymen of Opelika who distributed literature in their churches and defrayed the cost by voluntary contributions. To let the licence fee remain was to put an intolerable burden on a struggling peripatetic sect. 'Taxes when applied to itinerant sellers of literature are tantamount to suppression'. Justice Douglas said, 'Freedom of speech, freedom of religion, are available to all, not merely to those who can pay their own way'. It cannot be held that a tax grants a privilege—the privilege exists before the tax, in the United States Constitution.

In *Follett* v. *McCormick*[35] the majority again held that a licence fee cannot be exacted from a seller of religious books even though that be his full-time occupation. Justice Frankfurter and two of his brethren again dissented. 'We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemption to those who speak and to the press'.

SALUTING THE FLAG

To the consternation of his many liberal admirers it was Justice Frankfurter who delivered the court's 'illiberal' decision in the *First Flag Salute Case*.[36] The school district had ruled that all children attending the public schools take part in the daily flag salute ceremony. Children who refused to do this could be excluded from the schools. The Gobitis children, being Witnesses, could not, on grounds of conscience, take part in the ceremony because of their belief that the flag of the U.S. was a 'graven image'. They complained that they were compelled to salute the flag, because if not allowed in the public schools they were faced with the burden

[34] Justice Holmes. 'The power to tax is not the power to destroy while this Court sits', *Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218 (1928).
[35] 321 U.S. 573 (1944).
[36] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940).

of paying fees in private schools, and if they could not afford this they could be treated as delinquents for not attending school.

The court, eight to one, upheld the school district's rule in an opinion which clearly demonstrates the dilemma of judicial liberalism today. Justice Frankfurter upheld the exercise of the school district's power on broad sociological grounds, by holding that the end pursued—national unity—was not to be denied by the court's possible objection to the means employed. '. . . the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow men', but 'conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs'. Must these children be excused from conduct required of all other children in the promotion of national cohesion? It is impossible to find in the requirement 'the seeds of sanction for obeisance to a leader. . . . It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country . . .'. The promotion of national unity is a problem of governmental power. The court believed the school district to have this power and believed that they (the court) were acting liberally in not interfering with a process which presumably reasonable men had evolved for the needs of the community. That other means might have been employed was not part of the attitude assumed by the eight justices who were applying the doctrine of judicial self-restraint.[37] But Chief Justice Stone, dissenting, felt that in this case the court ought to act as the 'school board for the country'. There are other ways of teaching loyalty and patriotism. To compel a schoolchild to perform an act of patriotism in which he does not believe is to make a poor start in his education in the ideals of liberty and democracy. Moreover 'while such expressions of loyalty when voluntarily given may promote national unity, it is quite another matter to say that their compulsory expression . . . can be regarded as playing so important a part in our national unity'.

We have seen that in *Opelika*[38] three justices took the opportunity of declaring that they thought *Gobitis* wrongly decided. The reasons for this change of opinion are not clear, but we can assume that it was known to the justices, as it was to the country at large, that since this decision Witnesses had been increasingly 'persecuted' by war-minded local authorities. When the same

[37] See Vincent M. Barnett, Jr., 'Constitutional Interpretation and Judicial Self-restraint', 39 Mich.L.Rev. 213 (1940).

[38] *Supra*.

issue came up again in the *Second Flag Salute Case*,[39] *Gobitis* was explicitly reversed. Justice Jackson, for the court, stated here that the freedom guaranteed by the First Amendment can be restricted ' only to prevent grave and immediate danger to interests which the State may lawfully protect '. There was no danger that the children's action here would lead to disorderly behaviour. ' But here the power of compulsion is evoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort to muzzle expression '. It is disastrous that this action is being taken by a board of education, an authority concerned with education for citizenship. Its actions are liable ' to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes '. Moreover what is this national unity? If governmental pressure towards unity becomes greater so will strife become more bitter as to the characteristics of that unity. Compulsory unification of opinion achieves only the unanimity of the graveyard. ' The First Amendment to our Constitution was designed to avoid these ends (*i.e.*, compulsory unanimity) by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority '. The fundamental difference of opinion between Justice Jackson and Justice Frankfurter is expressed in the former's words : ' For there are village tyrants as well as village Hampdens, but none who acts under colour of the law is beyond the reach of the Constitution '. The Bill of Rights withdrew certain subjects from the vicissitudes of political controversy. The right to life, liberty and property, to free speech, press, worship and assembly are legal principles; they do not depend on the outcome of elections. But Justice Jackson is aware that the assertion of principles is simple; practical application is not. ' We must transplant these rights to a soil in which the *laissez faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through expanded and strengthened governmental controls '.

Justice Frankfurter's dissent opens with a moving appreciation of the freedom guaranteed by the Constitution. ' One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the court's opinion '. But that is not the point. Reasonable legislators could have taken the view that was taken by the education authority. The court is passing on the political power of a State, and the real question is, who is to make the necessary accommodations for conscientious objectors, the courts or the legislature? The

[39] *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

principles of 'self-restraint' demand that these be made by the legislature. Moreover, the court must avoid varying its powers according to the particular provision of the Bill of Rights which is invoked. Religion is entitled to no special treatment. 'The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. . . . It is only in a theocratic State that ecclesiastical doctrines measure legal right and wrong'. Compulsory vaccination, obligation to bear arms, compulsory medical treatment, have all been upheld against religious objection. Government based on the consent of the governed means that the citizen shares in the process of making laws; it does not mean that an individual's objection can prevail over the will of the sovereign. In the case under review, the individual's freedom is not totally denied because, as established in *Pierce* v. *Society of Sisters*,[40] the State cannot compel children to attend public schools. 'I find it impossible', concludes Justice Frankfurter, 'so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton Case* from what is nullified in this case. And for me, it still remains to be explained why the grounds of Justice Cardozo's opinion in *Hamilton*[41] . . . are not sufficient to sustain the flag salute requirements. . . . We may deem it a foolish measure but . . . this court is not the organ of government to resolve doubts as to whether it will fulfil its purpose'. The liberal spirit cannot be enforced by judicial invalidation or illiberal legislation. In the long run 'only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptation to fetter the human spirit'.

PUBLIC MONEYS AND PRIVATE PURPOSES

Exemption of religious activity from the usual fiscal exactions is a form of subsidy. Some communities, however, ignore these subtleties and find ways of assisting private religious activity with public moneys.[42] For the constitutional theorist this is a rich field. Before the Revolution many States had tax-supported established Churches,[43] and for years after Independence some of these Churches were supported from public funds. In the front ranks of the resisters to this taxation could be found illustrious names;

[40] *Supra.*

[41] *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934). The Supreme Court held that conscientious scruples could not exempt a student from compulsory military training at a university he had voluntarily entered knowing that all students there were required to undergo such training.

[42] See 'Catholic Schools and Public Money', 50 *Yale Law Journal* 917 (1941).

[43] Virginia, N. Carolina, Massachusetts, Connecticut, New York, New Hampshire and Maryland.

Patrick Henry, James Madison and Thomas Jefferson. Jefferson argued that ' to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical : that even the forcing of him to support this or *that teacher of his own religious persuasion* [44] is depriving him of the comfortable liberty of giving his contribution to the particular pastor whose morals he would make his pattern . . .'.[45] But despite the non-religious nature of the American Constitution, American society remains more than sympathetic to the needs of religion. The difficulty is to enforce the meaning of the First Amendment with regard to the establishment of religion in communities where only a minority believes in that strict construction which forbids any assistance, however insignificant or indirect, by public authority to religious activity. The Federal Government itself is not clear of the charge that it uses public funds for the encouragement of religion.[46]

In the *School Bus Case* [47] the court was required to pass judgment on an item of local legislation which gave assistance from public funds to the parents of children attending Catholic schools. The assistance was given to parents whose children attended public schools and Catholic schools—but not any other schools. There were no clear precedents on which the court could rely, although the *Cochran* and *Quick Bear* cases had dealt with the question from other angles.[48] Ewing school board, acting under the authority of a New Jersey statute, resolved that parents of children attending public schools and Catholic schools be reimbursed out of tax-raised funds for the bus fares of their children travelling to school. The action was challenged (1) as violating the Fourteenth Amendment in that public funds were used for private purposes; (2) as violating the First Amendment because Catholic schools, the heads of which were priests, were in fact churches. Had all schools been included in the school board's resolution the principle to be applied could have been the same as in *Cochran*, but the exclusiveness of the resolution exposed the school board to attack. This, however, did not prevent a five to four decision in favour of Ewing. Justice Black, for the

[44] Italics mine.

[45] Jefferson's Bill for Establishing Religious Freedom, XII Hening's Statutes of Virginia (1823) 84.

[46] *E.g.*, U.S. armed forces have chaplains. Church parades are compulsory at West Point and Annapolis. Under the ' G.I. Bill of Rights ' veterans may receive training for the ministry in denominational schools, etc.

[47] *Everson* v. *Board of Education of Ewing Township*, 67 S.Ct. 504 (1947).

[48] *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930). Supreme Court upheld free distribution of textbooks to *all* children attending public or private schools including religious schools on grounds that the children and the State are the beneficiaries of such appropriation. The *schools* do not benefit. ' They obtain nothing from them nor are they relieved of a single obligation because of them '. *Reuben Quick Bear et al* v. *Leupp*, 210 U.S. 50 (1908). Supreme Court upheld payments by Secretary of Interior to Catholic Indian Mission. Payments made not out of proceeds of public taxation but from interest accruing to ' Sioux Trust Fund '.

majority, opened with a recital of constitutional principle which seemed unfavourable for Ewing. 'A State cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause, because the children are sent to the church schools to satisfy the personal desires of their parents rather than the public interest . . .'. The First Amendment means that neither the State nor Federal Government can set up a Church. Neither can either pass laws which aid one religion, aid all religions, or prefer one religion over another. 'Neither a State nor the Federal Government can openly or secretly participate in the affairs of any religious organisation or group or vice versa . . .'. But despite what seemed a clear restatement of the doctrine of separation of Church and State, Ewing was upheld on the grounds that New Jersey had declared that a public purpose could be served by using tax-raised funds to pay the bus fares of schoolchildren. Moreover, because of the language of the First Amendment, New Jersey cannot exclude from the benefits of such a public service certain citizens who prefer to get their education in religious schools. 'The State contributes no money to the schools. It does not support them. Its legislation does no more than provide a general programme to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools'.

In a forthright dissent Justice Jackson disagreed with the court's reading of the facts on record. Ewing is not supplying a public service designed especially for the safe transportation of schoolchildren. It is using the regular transport system. Ewing is reimbursing out of public funds two classes of parents, and it is applying a religious criterion in respect of those children who do not attend public schools. Children who attend private schools other than Catholic are not benefited.[49] The issue is the basic one that in no circumstances can religion be made a public purpose. The court has in the past struck down local legislation on the grounds that it could not agree that a public purpose was being assisted by a particular use of tax-raised funds,[50] and it must act in like manner here. Moreover, there should be no hesitation in asserting that tax-raised funds cannot be used to support any aspect of Catholic education, for Catholic schools *are* churches, and State supported transport to churches is clearly unconstitutional.[51] The court has left to each State great latitude to decide for itself what shall be public purposes. It may make public business of welfare,

[49] 'The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier'—Ewing School Board minutes.

[50] See *Citizens' Savings and Loan Association* v. *Topeka*, 20 Wall 655 (1875).

[51] 'Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religion and moral training occupy the first place (Canon 1372)'. Rev. Stanislaus Woywood. *The New Canon Law*, 1940.

health, education, but it cannot make public business of religious worship. 'That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation. . . . It was intended . . . to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse'. The court ought to be consistent. Religious teaching cannot be a private affair when the State seeks to impose regulations which infringe on it indirectly and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. Those who may rejoice at the victory of religion in this case ought now to consider their present position. Not only is it possible that this decision could introduce into public life a great struggle of religious forces for access to public funds, but if the State should now support religious education it has a constitutional right to regulate it. '. . . this court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidises"'.[52]

In a separate dissent (in which Justices Frankfurter, Jackson and Burton joined) Justice Rutledge points to the dangers of the court's decision. *Cochran* made a breach in the wall of separation between Church and State; this decision has widened the breach. The First Amendment is uncompromising in its meaning.[53] Separation must not be subjected to confusing arguments from precedent. It is a high principle that must be maintained. In a fascinating survey of the history of religious faction in America Justice Rutledge argues that as test oaths and religious qualifications for office are now abolished 'the only serious threat to maintaining that complete and permanent separation . . . is through the use of the taxing power to support religion'. If what Ewing is doing furthers a public purpose there is no reason why States should not give full financial support to all aspects of religious education. The only possible view is that 'public purposes cannot be religious purposes'. If this view is not taken, 'The dominating (religious) group will achieve the dominant benefit; or all will embroil the State in their dissensions'. As the court has gone a very long way to protect religious freedom from interference from the State therefore 'we should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other'.

From the strong dissents in many of these cases it is abundantly clear that the First Amendment is susceptible of the most varied interpretations. We cannot blame the justices for their lack of agreement on the meaning which should be given to this Amendment today. We can only inspect the majority decision for signs

[52] *Wickard* v. *Filburn*, 317 U.S. 111 (1942).
[53] For a contrary view see O'Neill, 'Church, Schools and the Constitution' 3 Commentary 562 (1947).

of general tendency. And up to *Everson* these decisions suggest that the court's sentiment is in favour of the protection and encouragement of religion as far as the, fortunately indefinable, ' limits of constitutional power ' allow. This is unobjectionable, but it raises the question whether the court would give as adequate protection to those other freedoms which in the Constitution are on an equality with religious freedom. As Justice Jackson said, the meaning of many of these principles of freedom has withered in respect of economic matters in face of the scope and problems of modern government. But is it reasonable to assume that the court would protect unpopular political groups to the extent that it has protected the Witnesses? Would it apply the ruling in *Follett* v. *McCormick*, for instance, to a salesman of Marxist tracts employed by the American Communist Party? This seems unlikely. Unpopular political groups face difficulties which are as serious for the development of American democracy as any faced by small religious bodies. The difficulty of ' getting on the ballot ' is often almost insuperable.[54] Moreover, ' respectable ' political forces have appealed in vain to the court [55] for the rectification of grossly unequal electoral districts which prevent them, in political matters, from receiving the ' equal protection of the laws ' guaranteed by the Fourteenth Amendment. It seems that unpopular religious groups with beliefs which lead them into conflict with the State power are given a more thorough protection than would be given to political groups whose ideas do not conform to ' Americanism '. This can probably be explained only in general terms descriptive of the American ideology. On stage and screen [56] the parson is not depicted in the humourous and ludicrous roles so common in this country. Moreover, the unofficial forces of organised religion often play a role which is surprisingly powerful in the public affairs of a lay State.[57] Religion, however queer, is regarded as a stabilising factor in American civilisation. Queer political opinions are a danger to the conservative American ideology. The Americans are not a deeply religious people but the payment of lip service to religion is made by vast numbers in the belief that not to do so would be to endanger their social standing in the community. As modern America has never experienced an established Church and its attendant dignitaries, a school of respectable bourgeois anti-clericalism has never developed. The Supreme Court itself is not exempt from the subtle influence of religion in the American democracy, if only in the sense that, now, by a ' convention ' of

[54] See for the 1940 Presidential election, *Labor Fact Book* (1941), pp. 195–196. Also Chaffee, *Free Speech in the United States* (1941), pp. 490–493.

[55] *Colegrove* v. *Green*, 328 U.S. 549 (1946).

[56] Motion Picture Production Code, ' Particular Applications ', VIII, Religion: quoted in Inglis, *Freedom of the Movies*, p. 136 (1947).

[57] *E.g.*, banning of Bertrand Russell in New York colleges and banning of *Nation* magazine from school libraries, both due to pressure from New York Catholic community.

the non-religious Constitution, at least one justice must be of the Catholic, and one of the Jewish faith.

It is against this background that we should set the consideration of the decisions in religious cases. The court has shown itself willing to switch its doctrine for the purpose of achieving results which favour religion. Those who, armed with the Federal Constitution, move in to the attack, are halted by a defence of the State's competence to determine the nature of a 'public purpose' (*Everson*). Those who attack religious privileges in the name of 'public purpose' are beaten off by the authority of the Federal Constitution (*Barnette*). Some individual justices are consistent, but the court is not.

If, as has been suggested earlier, the court is really interested in the probable results of legislation, some of these results can grow to embarrass it. The *Flag Salute* had to be reversed. Whenever the court takes a clear stand on religious freedom it must of consequence be in an exposed position from which it may have to retreat. As the dissentients in *Everson* indicated, the court had put itself into a dangerous salient by permitting the application of public funds to private purposes, and it retreated in *McCollum*.[58] An interesting feature of the case is that Justice Black, who spoke for the court, invalidated support for religion out of public moneys, relied on his own argument in *Everson* in which he had demonstrated that religion cannot be tax supported, and was not apparently embarrassed by the fact that the result in *Everson* was to allow religion to be assisted by the State.

The Board of Education of Champaign County, Illinois, had a 'released-time' arrangement for religious education in public schools whereby, with the consent of parents and at no extra cost to the taxpayer, private teachers of various faiths gave free religious instruction to children whose parents desired it.[59] Children who did not wish to take part in any variety of religious instruction continued at their studies under the regular teachers. The issues were both more and less significant than in *Everson*. No 'extra' public moneys were involved. If no religious instruction had been carried on, the classrooms would have been used by the ordinary teachers. It would be impossible to argue that wear and tear on public buildings is greater when religious instruction is being carried on than when non-religious subjects are being taught. A taxpayer could not argue that he was financially burdened. The matter was more significant, however, in that public buildings were being used and that, as Justice Black observed, the public school system was a convenient, although not an essential, aid to sectarian groups

[58] *McCollum* v. *Board of Education*, S.Ct. Law Ed. Adv. Opinions, Vol. 92, No. 11, p. 451 (March, 1948).

[59] Similar arrangements are made in many States. Some two million school children participated in this type of religious instruction in 1947. See 'Church and State in American Education', 43 Ill. Law Rev. 374 (1948).

because it helped to provide pupils for their religious classes. The regular teaching staff agreed to provide each child with a card on which his parents could indicate whether they wished him to take part in this instruction and in what faith.

McCollum's objection was to the use of tax-supported property for religious instruction and to the close co-operation between the public school system and the inter-denominational religious council which supplied the 'private' teachers. A further objection was that, in what was a rather religious community, a child whose parents were not willing for it to receive religious education suffered a degree of embarrassment because of non-conformity. As Justice Jackson was quick to indicate, the Constitution protects the right to dissent but cannot prevent persons feeling embarrassed if they find themselves in the minority.

To Justice Black and to the majority of the court the action of the Board of Education 'falls squarely under the ban of the First Amendment' because it is quite clear that tax-supported schools are aiding religious groups to spread their faiths.

Justice Frankfurter, in a concurring opinion, bases his objections to the board's arrangement on his concept of the American public school system as a unifying factor in American life. This system should be used, and Congress since 1876 [60] has intended its use, as a means of synthesising the diverse religious and racial groups in the U.S. into truly national community. What the Board did was to re-emphasise the feeling of separation between children of different sects. The way to attain cohesion among a heterogeneous democratic people is by strict separation of Church and State. 'If nowhere else, in the relation between Church and State, "good fences make good neighbours"'. That Justice Frankfurter's sociological reasoning is effective cannot be denied, for it is relevant in a case of this nature that broad principles and historic purposes should be discussed. But sociology is an all-purpose tool, and it was used by Justice Reed, dissenting, to argue for the continuation of the practices condemned by the court. For him historic purposes should not restrain the promotion by local authorities of activities which are in accord with local custom and sentiment. National custom, as has been indicated, permits the expenditure of Federal money on religious activities in connection with Congress and the Armed Forces. 'Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text'.

R. H. PEAR.

[60] Since 1876 every State admitted into the Union has been compelled by Congress to write into its Constitution a requirement that it maintain a school system 'free from sectarian control'.

SOLDIERS' WILLS

Before 1677 the general rule of Ecclesiastical law was that everyone had power to make a will of personalty by a simple oral declaration, no form whatever being required. It was partly in order to suppress the perjuries which such a rule must doubtless have encouraged that the Statute of Frauds was passed in 1677. That Act set out elaborate requirements of form for both written and oral wills of personalty, but by section 22 granted to soldiers and sailors in certain circumstances the original wide power of testation that had existed for everyone before the Act. This same power was again preserved by the Wills Act of 1837, which was intended to reform and codify the whole law concerning wills. The proviso to section 11, re-enacting the words of the earlier Act, runs as follows: '. . . Provided always, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act'.

This power was extended to include real as well as personal estate by the Wills (Soldiers and Sailors) Act, 1918, which also extended 'soldier' to include 'airman' and confirmed an unjustifiable rule which had somehow developed, namely, that even minors, if soldiers, had power to make a will.[1] Thus the statutory rule as it stands today is that any soldier, being in actual military service, has power, whatever his age, to make or to revoke [2] a will without observing any form whatever.[3]

It is the words 'in actual military service' which have caused trouble all along. Much of this is due to the changed circumstances of military life, which is now vastly different from what it was in the time of Charles II, but nearly as much may be ascribed to an apparent unwillingness to apply the normal rules of statutory interpretation. For instance, it has been said that we are to keep separate the power itself and the reasons for it.[4] With great respect, however, it is submitted that the scope of an enactment can only be assessed by construing it in the light of the intention of the Legislature; and in practice judges have regularly looked for the intent of the Legislature when called upon to construe the words of any statute. There can surely be no reason to apply any other rule than the normal one, in the present case.

Various reasons have been suggested for the rule, or 'privilege'.

[1] The courts gave minors the power even though the Wills Act expressly deprived them of it! See *Re Wernher* [1918] 2 Ch. 82.
[2] See *Re Gossage* [1921] P. 194.
[3] Sailors have a similar privilege, but no further mention of it is made in this article.
[4] *Per* Denning L.J. in *Re Wingham* [1948] 2 All E.R. 908.

One fairly common is that it was intended to confer upon English soldiery the same privilege that the Roman legions enjoyed. This seems to have been taken for granted by the doctors of the Ecclesiastical Courts, who until 1857, it will be remembered, had exclusive jurisdiction over matters of probate, and who were wont to draw lengthy arguments from the Digest, the Commentators, M. Pothier and from numerous European codes.[5] In fact, however, the only excuse for allowing this intrusion of Roman law (the rules of which in any case are materially different from our rules on this point [6]), was that the draftsman of the relevant part of the Statute of Frauds was a renowned civilist, Sir Leoline Jenkins, and that in the preface to his biography there was a statement that he had once boasted of having conferred on English soldiers the same privilege enjoyed by Roman soldiers. From such small beginnings Roman law on this point permeated the English law as to military wills. Today, however, in spite of a long line of judicial references to the civil law and a tendency among writers to turn to the Corpus Iuris as to the original source, we may safely consider the Roman fallacy to have been exploded.[7] Another suggestion is that soldiers got special treatment because they were likely to be 'inops consilii', inasmuch as they could not readily obtain expert services to help draft the will. Therefore, runs the argument, while it is not necessary to look into the actual circumstances of every soldier, to find out, for example, whether his sergeant was formerly a solicitor or his general a judge, nevertheless a soldier is in actual military service when he is so placed that he cannot on account of that service readily procure the help of a legal adviser. We must not forget, however, that in 1677, and even in 1837, few soldiers were able to write, and that even fewer had the means to commit a document to anything like safe keeping. Therefore 'inops consilii' should surely have a wider meaning, possibly, 'out of reach of regular routine'. In any case, this principle was often followed in the last century, usually in conjunction with a further requirement, that he be in, or en route for, some kind of mortal danger. Thus, in *Sherman* v. *Pike* [8] the will of a soldier-servant who died on a sea-voyage (whether in peace or war does not appear) was not admitted to probate, and it was said: 'It must be under an actual engagement, attended with danger; otherwise mounting guard at Whitehall would be sufficient'. This principle appeared repeatedly, notably in *Drummond* v. *Parish* [9] and *White* v. *Repton*,[10] in both

[5] *Drummond* v. *Parish*, *infra*; *Bowles* v. *Jackson* (1854) 1 Spinks 294.

[6] In Roman law the will became invalid soon after the end of military service; in English law it retains its validity until revocation. See Inst. II 12, and cf. *Re Booth* [1926] P. 120.

[7] *Re Booth*, *supra*. It is noteworthy that Blackstone, while comparing the English rule with the Roman, does not suggest that the former derived from the latter. See 5th ed. I 13, 417.

[8] Quoted in *Drummond* v. *Parish*, *infra*.

[9] (1843) 3 Curt. 522.

[10] (1844) 4 N.C. 4.

of which it was held that a soldier, which incidentally was held to include an officer, living in barracks under peace-time conditions, was not entitled to the privilege. In the latter case Sir H. Jenner Fust said: '. . . this gentleman was residing in the town of St. John's, New Brunswick, where every soldier might have had the same assistance in making his will as a civilian'. Other cases to the same effect are *Re Hill* [11] and *Re Norris*.[12] On the other hand, wills made on the field of battle were held valid even though only verbal.[13] This tendency to restrict the privilege to times of imminent danger reached its climax in *Bowles* v. *Jackson*.[14] J. was a captain, stationed in Bombay. On August 14 he received orders to set out on the 22nd to attack a rebel force. On the 20th he made an unattested will: and was later killed. It was held, he was not in actual military service on the 20th, though he would have been on the 22nd. The reasoning in that case was in keeping with the precedents, but the decision itself is a little surprising and would hardly be followed today. After that case few appear until the time of the Boer War, by which time a tendency has appeared to interpret the words in a much broader spirit, not at all in keeping with the earlier decisions. The reason is no doubt partly to be found in the fact that the old Ecclesiastical Courts were replaced in 1857 by the Probate Court, with its barristers, in place of the former doctors of law, as well as in a new sympathy for the 'simple soldier', which became evident at the end of the century. A pair of important cases illustrate this well. In *Re Hiscock*,[15] a youth of twenty had volunteered for the South African War, and after a few weeks' training in England sailed for the Cape, where he died. Two days before embarking he made an unattested will. This was held to be valid, and the learned President attempted to lay down a principle (on p. 82): 'Only two matters can possibly be said to be tests. On the one hand, it may be argued that as soon as orders are received, the soldier becomes on "actual military service". I think it must be assumed, in the first place, that a state of war exists, with which the soldier is, or may be, connected; but, assuming such a state of war to exist, the question arises, when, or how soon, does the soldier become on actual military service? If he remained in barracks, he could not so be considered. One test that might be looked at is: Had he received orders to go? Was his battalion or regiment under orders for foreign service? My impression is,

[11] 4 N.C. 174.
[12] 3 N.C. 197.
[13] *Re Farquhar* (1846) 4 N.C. 651; *Re Churchill* (1845) 4 N.C. 47. In this case a general had made a properly attested will, which he took with him to the war. At a time when he must have been en route to the front he wrote an unattested codicil on the back of the will. The codicil was held void, as not having been made 'in expeditione'. But a note made by a doctor of the officer's dying wish was admitted to probate.
[14] (1854) 1 Spinks 294.
[15] [1901] P. 78.

however, that this test would be too wide, because the word " actual " has to be taken into account.

Then there is another test, which commends itself to me as the more correct one to be applied, . . . had the soldier done something —had he taken some step, at the time he made his will, to bring himself within the words of the section ? '. Then later (p. 84) : 'I am therefore of opinion that, by taking the first step of going into barracks with a view to being drafted to the front, he brought himself within the words and meaning of the eleventh section of the Wills Act, and that he was then engaged in " actual military service " '.

It is to be noted that the facts in this case are very similar to those in *Bowles* v. *Jackson* (*supra*), which was decided the other way; on principle the later case is to be preferred, and in fact it has been regularly followed. The same principle may be seen in *Gattward* v. *Knee*,[16] where a private soldier had written a letter from India a few days before the outbreak of the Boer War, at a time when his battalion was already mobilised and about to sail for South Africa. He was held to be in actual military service. The same test was also applied in the cases arising from the 1914–18 war: to be a soldier was never enough in itself: only if ordered to the front did he obtain the power of making an informal will. Thus a cadet at Sandhurst told his fiancée on June 22 that she was to inherit his property if he was killed; again, on July 6, he said: ' If I stop a bullet, everything of mine will be yours '. A few days later he left for the front and was killed. Horridge J., after hearing this evidence, refused to decide it without hearing evidence as to when the cadet had received orders to go to the front. It being later shown that he received such orders on June 30, the learned judge admitted to probate the verbal statement of July 6, but not, it must be noticed, that of June 22.[17] In another case an informal will made on ' overseas leave ' was admitted on the same ground.[18] The judgments in these cases show clearly that, although a wide interpretation was given to the words ' actual military service ', the judges never held that merely being in uniform conferred the special power. Thus the privilege was extended to a nurse on a hospital transport,[19] and to a captured soldier in a prisoner-of-war camp. But the unattested will of a St. John Ambulance man was not admitted, presumably because at the date of execution it was not certain that he was about to undertake dangerous work.[20] Again, in *Re Grey*,[21] probate was refused of the will of an officer, made just before entering hospital for an operation made necessary

[16] [1902] P. 99.
[17] *Re Stable* [1919] P. 7.
[18] *Re Kitchen* (1919) 35 T.L.R. 612.
[19] *Re Stanley* [1916] P. 192.
[20] *Re Anderson* [1916] P. 49.
[21] [1922] P. 140.

owing to sufferings during previous active service. The decision in *Re Booth* [22] was fully in keeping with the principle in the *Hiscock Case*. Some forty years previously, Booth had been a paymaster in the army in Gibraltar. On being ordered to Egypt to take part in the campaign against Arabi Pasha, he made an unattested will, which to the day of his death forty years later he never revoked, although he lost the actual document. The will was admitted to probate, the terms having been remembered by a beneficiary.

From the cases decided before the recent war, one can thus draw a fairly well-defined principle, provided the earlier cases such as *Bowles* v. *Jackson* (*supra*) are considered as having been determined more on their peculiar facts than upon any principle of general application. On the other hand, those cases might have been considered as an anchor, to prevent any tendency to be over-generous to any person who had received promises of future bounty from friends in uniform. It is furthermore submitted that that rule, besides being well supported by authority, is also justified on general principles. The underlying intent of the Statute of Frauds was to prevent fraud and perjury: that is surely the reason why testamentary power is subject to such stringent requirements. To have given to every soldier, in time of war, exemption from those requirements, even when he had the same ample opportunity of pondering his intention and finally committing it to paper in the necessary form, as he would have enjoyed, had there been no war, would surely have gone a long way to making nonsense of the whole enactment. Admittedly if the clear, unequivocal meaning of the proviso had conferred such exemption, the duty of the courts would be to follow that meaning in spite of everything. But the Legislature went out of their way to say 'actual military service', not just 'every soldier', or even 'every soldier in time of war'. It must have been the intention therefore to restrict the privilege to soldiers so circumstanced that they had not the opportunities, not only of legal advice, but of taking the advice of friends, of assessing property, of pondering and of doing the other things which particular circumstances may necessitate. 'Inops consilii' does not mean simply 'out of reach of a lawyer'. When a man feels that his death may not be far off, his mind turns to the desirability of making a will; if he is a soldier he cannot from the nature of things devote much energy to that purpose—hence the privilege. [Of course, a general rule was laid down; so that exceptional cases can be thought up, of a testator going off to the wars in the same platoon as twenty-six trained lawyers, while an unprivileged civilian leads an equally dangerous life, unassisted by any legal advice whatever. The possibility of such a case arising does not vitiate the general rule.] Thus the power arises, not

[22] [1926] P. 120.

merely when the soldier is in the middle of a campaign, but also when the campaign is imminent.

The decisions arising out of the recent war have shown nothing like the same attachment to principle as the earlier cases. As a result the law is no longer as certain as it used to be. There seems to be two possible underlying reasons for an enormous widening of the meaning of the words ' actual military service '. One is to be found in the peculiar circumstances of the war, in that for several years soldiers and civilians were equally in personal danger from air-raids, and the theatre of operations become world-wide. The other seems to arise from a feeling that it is a benefit to the testator himself to have a free and easy method of testation. It is submitted that this widening of the power is neither justifiable in view of the authorities mentioned above, nor advisable on grounds of public policy. A number of cases, while laying down no easily-discernible general principle, include under the heading of soldiers being in actual military service almost anybody in uniform.

Thus, in *In the Estate of Rowson*,[23] it was held that an officer in the W.A.A.F., who at some undetermined time of her service on the administrative staffs of various commands of the Royal Air Force during the war made an unattested will, was in a situation to enjoy the privilege, although no evidence was adduced to show that her position was any more perilous, or she herself any more *inops consilii*, than would have been the case had there been no war. In another case, too, a soldier serving in the army in England, who apparently (for the report is again defective in this respect) made his will in 1940, at a time when there was apparently no probability of his going overseas, was held to be entitled to the privilege.[24] What is surprising is that in these, as in other cases, very little emphasis has been laid on the circumstances of the testator at the time of making the will. Merely being in uniform was enough. The decision in *In the Estate of Rippon*[25] does however apply the test laid down in *Re Hiscock*. An officer of the Territorial Army was ordered to report for full-time duty on August 25, 1939. The informal will which he made before setting out was admitted to probate, the circumstances, it will be observed, bearing a close resemblance to those in *Gattward* v. *Knee* (*supra*), for although there was no war in progress, yet it was imminent and the soldier had taken some step towards joining in. On the other hand, in *In the Goods of Gibson*[25] probate was refused of a will made by a member of the Army Dental Corps who, it seems (the report is again defective), lived at home at the time of making his will. Henn Collins J. said: ' It would be going against the principle laid down in the authorities to grant this motion. I can understand the privilege being extended to a man mobilised for service abroad,

[23] [1944] 2 All E.R. 36.
[24] *In the Estate of Spark* [1941] P. 115.
[25] [1943] P. 115.

or told to go to a certain place for embarkation, but a soldier who is carrying out peace-time duties, although he is under military authority, is no more a fighting soldier because he is in the army than an ordinary citizen, who, in the circumstances of the present war, may be said to be in the front rank of the fighting. The foundation of the present rule is that a man is parted from civil surroundings, and the deceased never was '.

Dicta in a later judgment, that of Cohen L.J. in *Re Wingham* (*infra*), would appear to restrict that decision; but it is a little tricky, since it is not stated therein when the will was made; and where a dentist changes into uniform, but in no other way modifies his daily routine, it can surely not be asserted that he is in actual military service on that account alone. And, indeed, the learned Lord Justice was careful not to overrule the actual decision in that case. All the learned judge surely meant in that case was that a soldier does not acquire the privilege until (1) there is fighting in progress or imminent, and (2) for that reason the soldier is removed from peace-time army routine. The reference to ' fighting soldier ' is a little unfortunate, since non-combatants should be included, provided the work they do takes them out of normal surroundings. Of course, difficulties arose in the recent war from the fact that invasion was thought to be imminent, and indeed it may be argued that every soldier was therefore entitled to the privilege. But in view of the above decision it can only be said that those soldiers alone are included who have on account of war-service left the normal peace-time routine. The Home Guard were, it seems, hybrid; on parade they were, off parade they were not, privileged. Accordingly Lord Merriman held that a member of that body who visited his solicitor to give instructions for a will was not in actual military service,[26] while the House of Lords have held in a different connection that a Home Guard was a soldier as long as he was on parade; and in 1940, one would think, such service could rightly be described as active.[27] But perhaps the most important decision arising out of the war is that of the Court of Appeal in *Re Wingham*.[28] W. entered the R.A.F. for flying duties, and having trained in England for eight months went to Canada for the final stages. While there, and thirteen months after entering the R.A.F. (when he must have been very near the end of his training), he wrote an unattested will. Reversing the decision of Pilcher J., the Court of Appeal admitted the will to probate. Bucknill L.J. applied

[26] *In the Estate of Anderson* [1944] P. 1.

[27] *Blythe* v. *Lord Advocate* [1945] A.C. 32. This case arose on the construction of the word ' soldier ' in the Finance Act, 1894. A Home Guard killed on training was held to be a ' soldier ' at the time of his death. Lord Wright said (p. 55) : ' He is a soldier only when he is serving or acting or on duty as a soldier. At such times he has the privileges and responsibilities of a soldier and would be called a soldier. At other times he may be a butcher or a baker or a stockbroker or a solicitor '.

[28] [1948] 2 All E.R. 908.

a test in keeping with authority, pointing out that the airman was sent abroad with a view to taking part in active operations, was removed from normal routine, and was likely to be ordered to a fighting front at any time. Cohen L.J. agreed, and cast doubt on *In the Goods of Gibson* (*supra*), while the third member, Denning L.J., added to his judgment a sweeping dictum to the effect that the privilege of being in active service was, in time of war, co-existent with wearing uniform; and even after the end of hostilities, the armies of occupation enjoyed it; doubtful cases could only arise in peace-time, and even then the soldier was to be given the benefit of the doubt. With the greatest respect to the learned Lord Justice, we cannot see how such a construction is justified either by the words themselves or by precedent. To take an admittedly extreme case, which nevertheless has previously occurred; on the death, at whatever time, of any person who wore uniform in the war, it will be open to anyone brazen enough to be undeterred by the risk, to assert that the deceased once made a verbal will in his favour; or a will on a scrap of paper, since lost; and this will be possible even where the deceased made a solemn will before entering the uniformed force. Whatever the Legislature intended in 1677 and 1837, it was not to facilitate fraud. Again, it can hardly be thought desirable to be too ready to allow men of property to dispose of it by a chance remark, or by a letter written in a temporary fit of anger. But a widening of the present doctrine will have just that effect. The privilege is not that of the soldier, necessarily, but rather that of other persons who have kept letters written to them from friends in the army.

To sum up, it can be said that the power of informal testation which soldiers have arises: (1) when they are ' shooting members ' of a war-like campaign; and (2) when they are in uniform and either in an active theatre of operations, or under orders to go to such a place, or likely to be sent to such a place without notice, whether as ' shooting members ' or not; and (3) when they are prisoners-of-war.

D. C. Potter.

SOME ASPECTS OF THE OPERATION OF INTERNATIONAL AND MILITARY LAW IN BURMA, 1941–1945

ASSUMING the occupation by a belligerent of enemy territory to be effective—and it would be idle to contend that, for the greater part of the period under consideration, those parts of Burma under the control of the Japanese military forces were not effectively occupied—the occupant's right to govern by martial law is recognised at international law. His position has been thus stated :—

'Though the Martial Law of the Commander is not really law at all . . . it does not justify military oppression. Its stringency will, of course depend on the particular circumstances of each case; for example on the amount of danger to which the military forces under the Commander are exposed, and, in occupied territory, on the conduct of the local inhabitants, but, in every case, it should be administered in accordance with the universally recognised fundamental principles of honour, fairness, and justice.[1]

'Although the occupant in no wise acquires sovereignty over such territory . . . he actually exercises for the time being a Military Authority over it.[2]

'He may neither annex it while the war continues, nor set it up as an independent state, nor divide it (as Germany during the World War divided Belgium) into two administrative districts for political purposes.'[3]

By Article 43 of the Regulations Respecting the Law and Customs of War on Land; Annex to the Hague Convention of 1907, the occupant is obliged to do 'all in his power' to restore public order, security, and social and commercial life; he must, unless 'absolutely prevented', respect the existing laws, and his innovations must be compatible with international law and the dictates of justice.

It is proposed to examine some of the acts of the Japanese in Burma, and to compare them with the conduct, in the same departments, of the Sovereign Power, for the purpose of estimating how far the Japanese Military Commander fell short of what was required of him at international law, and of appreciating some of the difficulties which face an Occupying Power.

Notwithstanding that, by the Hague Convention of 1907, much has been done to define the rights and duties of belligerents, there

[1] Wheaton: *International Law* (7th ed.), by A. B. Keith, p. 240.
[2] Oppenheim: *International Law*, Vol. 2 (6th ed.), by Lauterpacht, p. 338.
[3] Oppenheim, *op cit.*, p. 342.

is a large field of inevitable and predictable activity by an Occupying Power regarding which the Regulations annexed to the Convention are silent. For example, there is no regulation regarding the taking of hostages, and the occupant's powers in dealing with them. Inevitably, international lawyers must, in the sphere to which no regulations apply, appeal to, and belligerents must profess to act upon, some ideal such as honour, justice, equity, good conscience, or the dictates of humanity; but it is submitted that there are no such universally recognised ideals. The word 'honour' obviously means much to a Japanese, and he is prepared, in certain circumstances, to make any sacrifice for the ideal which it represents to him, but that ideal is different from that conveyed by the same word to an Englishman. The latter would not, for instance, feel obliged to commit hara-kiri in circumstances which might make it binding on a Japanese, while Englishmen have no great regard for the ability of a Japanese to keep a promise in circumstances which would make it dishonourable, in an Englishman, to do otherwise. In this undefined sphere, what determines action, it is submitted, is not a universally recognised ideal, but national character.

It is easier to say that the authority of an Occupying Power should be exercised in accordance with the universally recognised principles of justice and humanity, than to define any principle recognised by the British, Japanese, and the Burmese. The Japanese lawyer, like the English lawyer, presumably argues that the principles of justice, equity and good conscience are to be found embodied in the law administered in the courts of his homeland, and that the conduct of the public officials of his country is a pattern for the world to copy. There is, then, a Japanese justice and a British justice, but it is desirable that at international law there should be but one justice.

At the risk of labouring this point, I wish to stress that the differences of point of view on certain matters upon which an Englishman might be disposed to assume universal agreement are so numerous and considerable, that, outside the Regulations referred to above, there are very few recognised principles of international law binding on an occupant. Outside the Regulations, too much is left to the conscience of a belligerent, who usually believes he is fighting for existence, and, without the stress of war, how different are the notions of different peoples as to what is unconscionable. A trial at law means to an Englishman a proceeding characterised by the presumption of innocence, proof of guilt by oral testimony of witnesses liable to cross-examination, the right to be heard in defence, and judgment by an impartial tribunal; this is assumed to be the natural right of any accused person, but British Civil Affairs Officers in Germany had to invent a phrase to express the plea of 'Not guilty'. British rules of evidence seem to most foreign

lawyers arbitrary and obstructive. The British practice of cross-examination is rarely understood or approved. Yet, before 1876, when torture was, for a time at least, abolished in Japan, convictions in the courts of that country proceeded on confessions alone, and the mode of trial was and is inquisitorial.[4] Police officers of other countries are not obliged to caution arrested persons, and, in Japan, even the popular heroes of the political murders of the 30's were detained in custody far longer than would have been permissible in England. The Chinese Penal Codes, inspired by the law of many countries, and the Japanese Penal Code, based on the Code Napoleon, owe nothing to the Indian Penal Code, founded on the English common law, and successfully applied in a neighbouring Asiatic country. Case-law, notwithstanding codification, is in the blood of an English lawyer, but the Japanese judge appointed by the Japanese Commander to supervise the activities of the High Court in Rangoon, standing in the library, and gazing without favour at the ponderous tomes on the shelves, produced a small pocket-book, which, he informed the Registrar, contained the whole Japanese law.

It would be idle to charge the Japanese with complete indifference to international law. A nation which, as the Japanese did, refuses to be bound by Article 44 of the Regulations mentioned above, which forbids a belligerent to compel inhabitants of occupied territory to furnish military information, must be presumed to intend to abide by other rules of international law.

It is submitted that it is not easy to assign a clear meaning to Article 43 of the Regulations referred to above, which require the occupant to respect existing laws, unless ' absolutely prevented '. His right to make almost any act which he chooses to regard as prejudicial to his war effort a ' war crime ' and punish it with death is valid, this regulation notwithstanding. Outside the wide realm of ' war crimes ', it is unlikely that he will feel any impulse to interfere with the substantive law of the occupied country, and, as he can administer martial law by courts-martial, he will only be disposed to interfere with the adjective law if the judges cannot or will not sit as before the invasion.

Regarding the position in Burma, it must first be said that the whole country was never over-run; there was always a not inconsiderable area in British hands. Then attention must be drawn to the difference between the German position in Belgium in the war of 1914–1919, and the Japanese position in Burma in 1941–1945. Whereas it may be assumed that only a negligible number of Belgians were not behind the Belgian Government, there was, in Burma in 1941, a vocal section of the community of strong nationalist views, while the majority of the Burmese were conscious of no duty to intervene in the conflict. A statement in the press,

[4] *Things Japanese*, by B. H. Chamberlain, pp. 278–284.

attributed to Lord Wavell in 1942, that 80 per cent. of the population were indifferent, 10 per cent. pro-British, and 10 per cent. pro-Japanese, comes as near representing the truth as any similar pronouncement, but it should be added that those who initially supported the Japanese did so in the hope of securing Burmese independence, and the great majority of them, being disappointed by the experience of Japanese occupation, were ultimately disposed to welcome British re-occupation, but still only as a step towards independence.

Once the invasion of Burma commenced in 1941, the Japanese advance was unexpectedly rapid, and the British administration collapsed before the advancing tide of battle. There were but few officers of British domicile serving as Deputy Commissioners or in more junior capacities in the districts, for Burmanisation of the services had proceeded to such an extent that the Burma Civil Service Class I was 50 per cent. Burmese. The original intention of the Government of Burma was that district officers should remain at their posts, and some officers, who never received the subsequent counter-order, spent the rest of the war in the degrading captivity which the Japanese deemed fitting for civilian internees. The decision to countermand this order was obviously right; had it stood, it would have been impossible to find trained British officials to set up an administration when the re-occupation commenced, and, while the Japanese might reasonably have been expected to intern their captives in tolerable conditions, it is difficult to see how they could have allowed them to perform their former functions, or to release them as the tide of battle ebbed.

Nevertheless, the decision to withdraw British officials before they were captured meant the more rapid collapse of the civil administration. When it was evident that the civil administration in a district was collapsing, three months' pay was given to all officials, and British officials withdrew to the rear, while Burmese officials usually retired to their own or their friends' houses to await developments, though some bravely stayed at their posts, or withdrew to the next district, doing what they could to assist in the task of maintaining order as long as possible.

Consequently, as the Japanese successively occupied fresh districts in Burma, they found that the civil administration had ceased to function, and they were faced with the task of performing their duty under Article 43 of the Regulations above cited. They could, no doubt, in the attempt to do 'all in their power' to restore public order, have handed over the civil administration to a pre-arranged Civil Affairs Service, but Japanese military budgeting seems inspired by the necessity of producing the maximum fire-power for the minimum expenditure. The military situation in 1941 and the earlier months of 1942 demanded that the pace of the Japanese advance should not slacken, and obviously the Japanese

Commander must have been bent on using all military personnel to that end.

The Japanese had with them the Burma Independence Army, of whose military value they obviously had no high opinion. This organisation was mainly officered by young Burmese Nationalists, some of whom had previously undergone military training by the Japanese, but the rank and file were mostly men of poor character, hastily recruited, untrained, and poorly disciplined. To this organisation the Japanese High Command entrusted the task of setting up a civil administration, but it brought the Japanese so little credit that they abandoned it in 1942.

The *modus operandi* of the Independence Army was to set up ' Peace Committees ' to conduct a rudimentary administration and administer justice of a kind. In one instance, the head of such a committee passed sentences of death for dacoity,[5] not so punishable by law, on police statements, without recording evidence. In another instance, the chief of the local police fined a person charged with murder.

Whether the Japanese, in the circumstances, did ' all in their power ' to restore the life of the community may certainly be open to argument. They were certainly not prevented from insisting that trials be conducted in the mode previously followed, but the past history, and conduct of the Japanese in Burma suggests that they did not regard failure to comply with British notions in this respect as a breach of the fundamental principles of justice.

In the latter part of 1942, when the military situation had become comparatively stationary, and most of the country was in Japanese hands, they set up an administration closely resembling the pre-existing British administration. It would, perhaps, be fair to say that the Japanese Commander then set about the task of doing ' all in his power ' to restore public order, were the administration not imbued with many totalitarian notions. Dr. Ba Maw, an ex-Premier, who was, at the time of the invasion, a political detenu, was made the head of the administration, consisting of politicians, former civil servants, with a stiffening of Japanese civil and military officers. Obviously the main reason for selecting Dr. Ba Maw was his ability to perform the task set him, and,

[5] Robbery is ' dacoity ' when the total number of persons present, including those aiding and abetting, is five or more. It is punishable, under s. 395 of the Penal Code, with transportation for life or imprisonment for ten years, and the offender is also liable to fine. If murder is committed during the course of a dacoity, every person participating in the dacoity is liable to suffer death under s. 396. By the Emergency Provisions Amendment Act, 1943, passed by the Governor in the exercise of his emergency powers, dacoity *simpliciter* became punishable with death, but this particular dacoity was committed before this Act came into force. In the case of a dacoity committed in occupied Burma after this Act became operative, would the offence be punishable with death, though the persons concerned were unaware of the change in the law, by application of the rule in *R.* v. *Bailey* (168 E.R. 651)?

generally speaking, ability and suitability were the criteria by which functionaries were chosen.

The Japanese Military Commander, by proclamation, confirmed the pre-existing law and procedure, but excepted from the jurisdiction of the Burmese courts cases triable by Japanese military courts, including certain classes of cases in which Japanese subjects were involved. Courts comparable to those existing before the occupation were set up, and these generally made an honest endeavour to administer the law in force before the occupation, though no judge was disposed to offer himself as an ineffective martyr in the cause of justice. The original jurisdiction of the High Court passed to a Rangoon City Court. The Japanese Commander retained the right to revise decisions of the High Court, and a Japanese judge was appointed to supervise the activities of that body; neither of these officials was guilty of unwarrantable interference.

The main criticism of Japanese conduct during this period must be directed against the activities of the Japanese Military Police, the Kampetei, who were chiefly concerned with ' war crimes '.

In the matter of ' war crimes ', the Regulations referred to above have done little to clarify or render more humane the principles of international law. Article 29 defines a spy as a person who, acting clandestinely, or on false pretences, endeavours to obtain information in the zone of operations of a belligerent; it specifically excludes soldiers in their own uniforms and despatch carriers, while Article 30 forbids their punishment without previous trial.

Here but one out of many possible war crimes has been selectively dealt with, and the law as to the other crimes is left where it has been brought by custom. War crimes have been divided into four categories [6]:

(i) violation of the rules of war;
(ii) all hostilities in arms committed by individuals who are not members of the enemy's armed forces;
(iii) espionage and war treason [7];
(iv) marauding;

a classification adopted in the British *Manual of Military Law*,[8] which, however, refers, in addition, and in the same connection [9] to acts which a belligerent may forbid and punish, like ' war crimes ' with death, though they are ' not violations of the rules of war ' and ' not war crimes ', such acts as failure to take out a pass, acts which the military commander regards as prejudicial to military

[6] Oppenheim, *op. cit.*, p. 451.
[7] ' Injuring or endangering the belligerent's interests by deceit, or by sending messages to the opposing army with regard to the position, movement, plans, etc., of the belligerent whether in the field or occupation ': Kriegsbrauch im Landkriege, Wheaton, *op. cit.*, p. 241.
[8] *Manual of Military Law* (1929) Ch. XIV, para. 442.
[9] *M.M.L.*, Ch. XIV, para. 446.

government. Professor Keith [10] puts such acts in the category of 'war crimes', and it is difficult to see on what grounds they are excluded. Professor Lauterpacht [11] defines 'war crimes' as 'Such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders', which is the only possible practical definition, though it owes nothing to universally recognised ideals. The Defence of Burma Act and Rules, and similar products of the legislatures of belligerents, made a statutory crime of almost every act remotely conducive to the advantage of the enemy's war effort, and the commander of military forces occupying enemy territory cannot be expected to be milder than the de jure government.

War crimes are punishable with death, but, whereas the *Manual of Military Law* [12] states positively that there must be a trial before punishment, Professor Keith says '*As a rule*, no penalty should be inflicted on offenders without previous inquiry and condemnation by a court-martial'.[13] It would seem that the form of the statement in the *Manual of Military Law* was so chosen as to give a military officer advice which would be brief and safe to follow, for obviously the rule as there stated must be subject to such exceptions as the enemy agent, who, though not a 'spy' as defined by Article 29, is captured collecting information near the firing line, and other persons captured in circumstances which make it impossible either to hold an immediate trial or arrange for their detention in custody.[14] In such circumstances, the instructions in the *Manual of Military Law* notwithstanding, the prisoner will, presumably, be summarily executed.

As has already been said, however, the Japanese cannot be regarded as holding an Englishman's view of what constitutes a trial, and it must also be conceded that, in time of war, there is a risk of standards of proof on charges of 'war crimes' falling.

Making all allowances, however, the procedure of the Kampetei offended both against humanity, as understood by an Englishman, and against reason. The use of torture was almost automatic; it had been so throughout Japanese history, until formally abolished in 1876, and presumably it became unconcealed with the disappearance of all liberal notions in the 30's. The officials of the Kampetei seemed unnecessarily credulous; possibly a government which dopes its subjects with subjective propaganda eventually deprives its own officials of the power of objective reasoning. The following facts, related by some who survived the incident, shows one aspect of its activities.

[10] Wheaton, *op. cit.*, p. 242.
[11] Oppenheim, *op. cit.*, p. 451.
[12] Ch. XIV, para. 449.
[13] Wheaton, *op. cit.*, p. 240.
[14] A 'spy' as defined by art. 29 might be caught in similar circumstances and place his captor in the dilemma whether to break the regulation or to break military security.

Allied bombers, probably forced by necessity to jettison them, dropped bombs near a village of no military importance. The Kampetei, assuming this to be deliberate bombing, and that the villagers must have signalled to the bombers, collected and interrogated the villagers, who consisted of both Burmans and Indians. Torture failed to extract any information; possibly the victims had no notion of what they were expected to reveal. A Burmese police officer was then called in to help, and he, after segregating Burmans from Indians, suggested to some Burmese bad characters that it would be to everyone's advantage that they should accuse some Indians of signalling to the bombers with mirrors. This suggestion was implemented, and a Kampetei officer, having given monetary rewards to the informers, executed the Indians who had been denounced.

To an Englishman, such a method of securing 'evidence', and such a mode of trial is horrifying, but, putting aside Japanese history, is the former very different from that which a subject of a totalitarian State may expect to endure when, in circumstances over which he can exercise little control, he becomes suspected of being ill-disposed towards the State? As for the mode of 'trial', it may be of interest to observe that, after the Japanese surrender, when it became necessary for British General Officers to confirm sentences passed by Japanese courts-martial upon surrendered Japanese personnel, the records of such proceedings had necessarily to be submitted to the officer on whom lay the duty of confirmation, and in some early cases at least, such records were so brief and vague as to leave the question whether there had been an attempt to comply with the form of justice, as understood by an Englishman, in doubt.

The courts set up in Burma to administer private law, and the ordinary criminal law, were not, like the French courts in 1870, which the Germans were obliged to suspend because they refused to proceed in the name of the Emperor Napoleon III and claimed to derive their authority from the French people, unduly harassed by the question in whose name they were to pronounce judgment. The Burmese judges seem to have adopted the view that no adjective should qualify justice.

Early during the occupation, an 'Independence Preparatory Commission' was appointed; it was not an elected body; it was sponsored by the Japanese, and its members chosen by Dr. Ba Maw and his advisers. It drafted a 'Constitution Act', which was 'approved' by the 'State Assembly Board' (the Independence Preparatory Commission under another name) on August 1, 1943, when the Independence of Burma was proclaimed. The distinctly totalitarian nature of the proceedings was emphasised by the slogan 'Ta Thwe, Ta Than, Ta Mein' (One Blood, One Voice, One Leader) broadcast at the same time. A declaration of war on Great Britain

and the recognition of the 'independence' of Burma by the Axis Powers followed.

In view of the difficulty of governing Burma, while a battlefield, by a government other than one authoritarian in form, it would be of little practical value to criticise these doubtless Japanese-sponsored activities from the standpoint that there had been an unjustifiable breach with the laws which had set up parliamentary government in Burma, but in sponsoring the proclamation of independence, and by their recognition of Burma's independent status, the Japanese appear to have been guilty of a deliberate breach of international law, forbidden by Articles 42–56 of the Regulations referred to above.

This was not the only breach of its kind committed by Axis Powers during the war of 1939–1945. Germany and Italy treated their occupations as conquests. Luxemburg, Eupen and Malmedy were annexed to Germany, and Croatia was set up as a separate kingdom.[15]

So long as there are national States, and no international authority with power to enforce its justice, this seems a breach of international law of a kind against which it is difficult to find a sanction. If the occupant which has been guilty of such misfeasance wins the war, the other belligerents are unlikely to be in a position to object; if it loses, or if the result is doubtful, the annexation may be reversed by the peace treaty, but other questions will overwhelm consideration of enforcing any other penalty.

The situation before the Japanese in Burma, which has been described above, was calculated to encourage the Japanese to recognise its 'independence'. The Japanese were compelled to pose as the liberators of the Burmese from the oppressor and the occidental, for they had no material advantages to offer. By military force they could secure all that was essential to them, at least for the period of the war, and, by recognising Burmese 'independence' they could relieve themselves of a large part of the burden of providing a civil administration. For a time at least, it would improve their position *vis-à-vis* the Burmese.

The main objections to the practice of annexing occupied territory were that it usually involved treating the occupied territory as loot, and the enlistment of the active male population in the occupant's military forces. It must, at least, be conceded that these possibilities weighed very little with the Japanese in deciding to act as they did. There was looting, but it would be difficult fairly to apportion responsibility between the Japanese and the Burmese bad characters who had the first opportunity. Burmans

[15] Annexation of occupied territory was first denounced by Vattel in the middle of the eighteenth century, but was not outlawed until the Convention of 1907. The last occasion on which Britain practised it was in 1813, when it sold Guadeloupe, taken from France, to Sweden. It was restored to France in 1814: Wheaton, *op. cit.*, p. 234.

were impressed into the Labour Corps. These things could, however, have been done without recognising Burmese ' independence '.

Let us now cross to the other side of the battle line.

When the British Civil Administration collapsed before the oncoming tide of battle, martial law was proclaimed in some districts. In effect, this meant only that, in the brief period before the arrival of the Japanese, some looters were tried by field general courts-martial, composed of military officers and civilians with a knowledge of law. In the circumstances, whipping and death were the only possible effective punishments, because a jail delivery was invariably effected before the Japanese arrived,[16] so that only a small fraction of any sentence of imprisonment would be served. Whipping could not be inflicted on men over forty-five or physically unfit, and the courts showed no enthusiasm for death sentences.

When the military situation became stabilised in 1942, the Chin Hills, parts of North Arakan and North Burma remained in British hands. The Government had retired to Simla, and, parliamentary legislation being no longer possible, the Governor, in the exercise of his powers under section 139 of the Government of Burma Act, assumed all legislative powers.

In those parts of Burma still in British hands, most of which lay in those areas not subject to the control of the Ministry, but administered by the direct authority of the Governor, the same type of administration, administered by the same officials as before the invasion, continued, but the Governor, in exercise of the legislative powers which he had assumed by proclamation under the Government of Burma Act, passed emergency legislation which, it is respectfully submitted, was not only *intra vires* of his statutory powers, but fully justified by the abnormal circumstances. This emergency legislation made all important cases triable by special judges, and abolished committal proceedings and appeals, but death sentences had to be reviewed by a judge of the High Court. Procedure was generally simplified, and the discretion of courts was enhanced, but, in essentials, the mode of trial was not affected. Provision was made (as far as the writer is aware, it was never employed) in certain cases of contumacy, for trial *in absentia*, but the features of the British mode of trial were preserved.

There was little to choose between the Emergency Acts and the Proclamations of the British Military Commanders in spirit and subject-matter, but the Government maintained (and the writer can find nothing to say to the contrary) that its actions were invariably justified by circumstances and intra vires of its powers. The Governor's Enactments were published in the *Burma Gazette*, which had a small circulation, chiefly at Simla, and this was not, perhaps, a satisfactory method of bringing changes in the law to the notice of the general public. This point was taken in a murder review

[16] The staff of the jails consisted mostly of Indians.

in 1945. When the case, *Chitambaram* v. *King-Emperor* (*sic*) [17] eventually came before the Privy Council, that point was dropped, presumably as it was covered by *R.* v. *Bailey* [18] referred to above, and the argument proceeded on the wider basis that the Special Judges Act was *ultra vires* of the Governor's powers, inasmuch as the Government of Burma Act forbade legislative interference with the jurisdiction of the High Court. This contention was, however, repelled, it being held that the Government of Burma Act did not prohibit the creation of a new court having concurrent jurisdiction with the High Court.

By 1944 it became possible actively to contemplate the re-occupation of Burma. Since February, 1943, the Army had been building up a Civil Affairs Service, and His Majesty's Government showed no reluctance to employ an adequate number of Civil Affairs Officers, but it was not easy to recruit and train sufficient and suitable personnel. A Burma civil servant might understand the problems arising in Burma, and have ideas about dealing with them, but be less capable of understanding the interior economy of a Civil Affairs Service. The number of trained Civil Administrators was not large, nor was the supply of suitable military officers to instruct these disguised civilians in the army way of doing and obtaining things. The General Administration and Judicial Establishments were habitually below strength, and officers in these departments generally had more work than they could satisfactorily do.

It would, no doubt, have been possible to empower Military Commanders to carry on civil administration in re-occupied Burma by statute, but the Supreme Allied Commander preferred to act on the instructions in the *Manual of Military Law* [19] which sets out, cautiously, the views of Dicey. These instructions are :—

' No such thing as martial law exists under our system of Government. . . . In time of invasion . . . exceptional powers are often assumed by the Crown acting usually . . . through its military forces . . . and the expression " martial law " is sometimes employed as a name for this common law right of the Crown . . . to repel force by force in the case of invasion . . . and to take such exceptional measures as may be necessary for the purpose of restoring peace and order. The intention to exercise such exceptional powers, and to take such exceptional measures is generally announced by the issue of a proclamation of martial law. . . . To obviate any question as to the legality of the measures taken for this purpose . . . it has been usual subsequently to pass . . . an Act of Indemnity '.

These instructions were, as far as the Higher Commands were concerned, obeyed in the spirit and the letter. The Supreme Allied Commander made it clear that he was exercising a common-law

[17] [1947] A.C. 200. (H.M. was King, not King-Emperor, in Burma, after 1937.)
[18] 168 E.R. 651.
[19] *M.M.L.*, p. 4.

right, and that his acts, and those of his subordinates, could be justified, if at all, by necessity only.

With regard to the acts of the Supreme Allied Commander and his subordinates, no question of international law arises, but their acts are relevant as affording evidence of what international law would require of a belligerent in occupation of Burma.

By a proclamation of January 1, 1944, the Supreme Allied Commander assumed responsibility for every function of Government in those parts of Burma then being or thereafter to come under his control, and he delegated to the Chief Civil Affairs Officer full authority to conduct the military administration of the civil population of Burma.

On the same date, the Chief Civil Affairs Officer issued a proclamation depriving all courts in Burma, not established by him, of their jurisdiction and powers, but confirming all laws then in force, except in so far as they were amended by that or future proclamations.

Thereafter, such amendments of the laws as were made by the Chief Civil Affairs Officer were made by proclamations published in the *Gazette* of the Civil Affairs Service, which enjoyed no wider circulation among the general public than did the Government of Burma's *Gazette*, and the printing of which was often delayed. But for slight difference in form, these proclamations might have been Governor's Acts. They were scrutinised by legal advisers at South-East Asia Command and at the War Office, who showed little hesitation in calling in question, and insisting on the withdrawal of provisions which might have provoked no comment in a Governor's Act. To give instances, a proclamation extending the death sentence, beyond where it had been carried by the Emergency Acts, to possession of firearms, and a provision in the first proclamation of the Chief Civil Affairs Officer, empowering him (naturally acting on skilled advice) to convert a finding of ' not guilty ' by a Civil Affairs Court into one of ' guilty ', notwithstanding that the High Court had, under section 417 of the Code of Criminal Procedure, this power in appeal by the Governor, were both cancelled.

The amendments in the law made by proclamation were inconsiderable. All rules as to venue of criminal cases were abolished. Death sentences now required confirmation by the Chief Civil Affairs Officer, who was advised by two officers who subsequently became judges of the High Court; later all such sentences had to be referred to the Supreme Allied Commander. All criminal cases were subject to review; the vast majority were reviewed. It had been intended to set up civil courts of small causes, but it proved impossible to recruit judges for these, and, in the period during which the military administration functioned,[20] the necessity for such courts did not become obvious.

[20] Civil Government was resumed in October, 1945, but the Military Administration continued in Tenasserim until the end of the year. Such a measure taken

Judicial powers were conferred on officers by notification in the *Gazette* of the Civil Affairs Service. Almost every officer of the General Administration and Judicial Departments was given either the powers of a Special Judge, enabling him to pass death sentences, or those of a District Magistrate, which enabled him to inflict sentences of imprisonment not exceeding seven years, and, generally speaking, Civil Affairs Officers received higher powers than they would have exercised in time of peace. By contrast, the corresponding officials empowered by, or with the approval of the Japanese, had the same or narrower powers than their predecessors before the invasion, for, it is interesting to observe, when the administration was first set up, administrative officers were not permitted to exercise any judicial functions. British officials always paid lip-service to the principle of separation of powers, but found it impossible, on financial and administrative grounds, to put it into practice, except in the upper ranks of the hierarchies, and the first attempts, under Japanese occupation, to enforce a rigid separation had to be modified.[21] It seems likely that this experiment in separation of powers was inspired by Dr. Ba Maw and his advisers, but the Japanese evidently saw no objection to it.

From the point of view of a prospective suspect, what is more important than a comparison of the powers granted to the officials of the two regimes is an examination of the spirit in which the powers were exercised.

On the British side of the battle line, not many death sentences were passed or confirmed. To this three factors contributed, the British officer's natural antipathy to passing such sentences, the inevitable policy of appeasing the Burmese, and the difficulty of efficiently executing a death sentence through the instrumentality of reluctant Burmese police. As some jails had been destroyed and others were required for other purposes, temporary jails had to be erected, and these created a reluctance to impose sentences of imprisonment.

Individuals who could have been tried and condemned for waging war against the King had little more to do than profess a resurgence of loyalty to escape trial altogether. Lenient treatment was shown to persons guilty of malpractices, if they could set up a credible story of having acted under Japanese pressure.

In form, the chief differences between the Japanese-sponsored administration and the British military administration were the activities of the Kampetei under the former, and the way the officers of the latter were strictly bound by the terms of the military

by an occupant might conceivably offend against the rule forbidding the division of the occupied territory into two administrative districts.

[21] Later administrative officers were empowered to pass orders to furnish security, or for detention in default, against persons reputed to be habituated to serious crime, but they were not permitted to try persons accused of specific criminal offences. Magistrates were formerly empowered under the ' preventive sections ' of the Code of Criminal Procedure to demand security from reputed criminals.

proclamations. The nearest analogy to the Kampetei on the British side of the battle line was the Field Security Service, but, whereas the Kampetei seemed to have unlimited powers and discretion, the other had no power to try and sentence, and even its powers of arrest and detention were statutory.[22]

It could not be contended that there were no breaches of the somewhat stringent regulations which bound military personnel during the campaign, and there were incidents which might have been questioned subsequently in the civil courts. While there appears to be ample authority for establishing and continuing martial law while war is 'raging'[23] it seems arguable whether offenders against the ordinary law can be tried by Civil Affairs Courts continued in areas from which the tide of battle has far receded, or whether military government can be continued after the enemy has surrendered. However, events in Burma added nothing to what has been said on these questions, and honest breakers of the regulations were protected, because the Indemnity and Validating Act, passed, on the return of the Civil Government, in exercise of the powers assumed by the Governor under the Government of Burma Act, prohibited legal proceedings in respect of acts done in good faith in the purported discharge of duty. Sentences passed by Civil Affairs Courts were declared valid, and provision was made for review and confirmation of such sentences as had not become final at martial law.

A War Crimes Court was set up to deal with Japanese military personnel guilty of crimes against international law and humanity. After the re-occupation, some Burmese officials remained unemployed while inquiries were made into their conduct during the occupation, but ultimately no judicial officer suffered any punishment.

The writer feels bound to conclude that the Japanese made a praiseworthy attempt to do that part of their duty at international law which required them to make provision for the exercise of administrative and judicial functions of the government of the occupied country, save with regard to war crimes. Illegal as the recognition of Burmese 'independence' was, it did not do the Burmese any tangible harm; the Japanese had a precedent in the conduct of two European belligerents, and, if Britain did not treat the incident as *damnum sine injuria*, she did not over-much complain of it.

With regard to war crimes, however, and the activities of the Kampetei, it is impossible for an Englishman to say much in extenuation.

A. Gledhill.

[22] By s. 14 (*ff*) of the Courts (Emergency Provisions) Act, 1943, a police officer's powers of arrest were conferred on all members of H.M. Forces.

[23] *E.g.*, *Tilonko* v. *Advocate-General of Natal* [1907] A.C. 93.

REGISTERED CONVEYANCING AND THE LAND LAW

Not so long ago to refuse a challenge was to be dubbed a coward. Mr. Hargreaves, in a learned review of a little book by the writer,[1] has challenged the correctness of some suggestions put forward in that and other books on a vital issue. It is conceived that the greater the issue the greater the challenge. Nevertheless, in taking up the gage we cannot hope to pledge a dogmatic rebuttal.

Those who have read the review closely, and Mr. Hargreaves' views are always entitled to respect, will know that the ultimate issue raised can be found in the last few sentences. We have taken the liberty to repeat them:—

> For whom does land law exist? For the land owner and his neighbours, or for the conveyancer? Put in this way there can surely be only one answer to the question. Yet to the land owner, what is important is the substantive nature of his rights and duties; of those rights, the right to convey is merely one, and the technical method of exercising that right is to him of secondary importance and a matter which hitherto he has been content to leave in the hands of his technical advisers. If this be the true perspective, the time has surely long since passed when land law could be considered in the main as a secretion in the interstices of conveyancing.

This is a graver issue than appears on the surface. We do not wish to pursue the widest issues here, though we may remark that the law primarily exists for the community. In fact we approach a narrower field. The 'land law' is wider than the conveyancer's land law, because it has been developed in other fields and by other processes of reasoning. This does not mean that the conveyancing land law does not still depend largely upon conveyancing machinery. The proof of this is to be found very largely in the facts of conveyancing law which determine the interests and powers of owners and incumbrancers of interests in land. It is, therefore, desirable before pursuing this fundamental question to examine the bases on which the challenge was issued. We think that Mr. Hargreaves has not always understood the point we wished to make and that he may be mistaken on some of the rules of law he has laid down.

His criticism of the matter of the book reviewed appears to fall under five heads, and in his view (i) the registered proprietor has not a 'statutory estate'; (ii) 'overriding interests' is not an essential branch of classification of interests in land; (iii) the powers

[1] (1949) 12 Mod.L.R. 139: review of *The Principles of Land Law under the Land Registration Act.*

of a registered proprietor are not confined to those conferred by the Land Registration Act; (iv) the interests included in section 101 (1) of the Land Registration Act are not confined to a particular class of minor interests; (v) section 107 of the Act confers special powers affecting interests other than mere contracts.

(i) The learned reviewer criticises a passage which suggests that the designation of the powers of a registered proprietor (cf. section 18 of the Land Registration Act) operated today to destroy 'the old common law owner beneficially entitled'. It is thought that, read into its context, all this passage was intended to convey was that a registered proprietor had *as such* no powers of disposition not authorised by the Act. It was not a dogmatic assertion that the registered proprietor had no common law estate.

The criticism is based on the assumption that this writer is in error due to a confusion between the *existence* of a power and the manner of its *exercise*. From which I assume that Mr. Hargreaves is of opinion that the registered proprietor enjoys his powers of registered disposition together with his other powers of disposition as legal owner at common law and not by virtue of his registered (or statutory) interest.

As an illustration of the absurdity to which any other view would extend, Mr. Hargreaves suggests that I have been *compelled to assume* that on the death of a registered proprietor the legal estate is *in nubibus* (see *Principles of Land Law* at pp. 59–61). Reconsideration of the relevant passages will show that the opposite conclusion was in fact reached, but in Canada, under a similar system of registration, a learned authority has advanced the view that the estate is *in nubibus* on death.

However, the real issue is whether a registered proprietor has a statutory estate and, if he has, whether he also has a common law estate conferring rights of disposition independently of the Act but affecting the legal estate. These propositions are, of course, severable.

Any consideration of the existence of a registered estate is rendered less necessary because of a recent investigation of this question in several registered systems,[2] but it may be convenient to recall the background of sections 69 (4) and 109 of the Land Registration Act. Before 1926 the courts seem to have had little doubt about the separate existence of the registered estate from the common law estate.[3] The continued existence of a legal estate owner having powers of disposition of the legal estate independent of the statutory estate, which was the effect of those decisions, was found to be so embarrassing that section 69 (4) was passed and incorporated in the Act to abolish it. In *Chowood* v. *Lyall*,[4] though

[2] See Connell, 'The Registered Estate', *Conveyancer* (N.S.), Vol. 11, p. 184: we see no reason to disagree with the learned writer's findings.

[3] *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631; *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47.

[4] [1930] 2 Ch. 156.

the expression 'statutory title'[5] is primarily used, the judgment of Lord Hanworth M.R. seems to assume a 'statutory estate'.

It may be argued that the effect of section 69 (4) as read with section 109 in destroying the common law estate altogether is more uncertain. All that section 69 (4) provides is that the 'estate for the time being vested in the registered proprietor' can only be 'disposed of or dealt with by him' in the 'manner authorised by the Act'. Section 109 prevents a disposition from being made under Part IX of the Act (primarily concerned with unregistered dispositions) where another Part applies. Of this section Sir John Stewart-Wallace remarks (*Brickdale*, 4th ed., p. 255): 'As all the powers of the proprietor as such are the creation of the Act it is obviously essential to any dealing with him that the statutory authority for it is unquestionable'. It must be remembered that the legal estate vested in him is the estate which is registered: see section 2 (1). He cannot dispose of this legal estate except in conformity with his statutory powers. I find it difficult to see what sort of a ghost of a common law estate is left, but it may be material for the purposes of enjoyment as distinct from disposition. As I have pointed out elsewhere this aspect of the law has practically been neglected by the Act.

(ii) The learned reviewer proceeds to observe that 'the two functions with which the Act is essentially concerned are, first, the manner of creating and transferring interests and, second, the protection of interests once they are validly created'. With respect, it is thought that the two *principal* functions of the Act were (i) to simplify *title* to *certain* interests in land, and (ii) to compensate anyone for loss in certain circumstances when dealing with those interests *in reliance on the register*.[6] It was to simplify investigation of title to certain interests and thereby cheapen conveyancing. The other interests were a nuisance, but it was felt that they could not be eliminated altogether and so arose what Sir John Stewart-Wallace[7] has described as 'the stumbling block' in registration of title, namely, 'overriding interests'; and he so describes it because he says that it makes 'absolute title' 'something of a misnomer'.[7]

Nevertheless, Mr. Hargreaves thinks that it is wrong to treat 'overriding interests' as a special and determining class of interests in registered land law. This is due, perhaps, to his view, as I understand it, that certain types of interest, such as easements, cease to be 'overriding interests' on noting on a title: see section 3 (xvi), which refers to 'interests not entered on the register'. This view may, of course, be correct and the result of noting the interest may make it a 'registrable interest' so far as the 'dominant tenement' is concerned—to this point we will recur.

5 'Statutory title' and 'statutory estate' are terms which seem apt to confusion in the decisions on registered systems in the common law jurisdictions.

6 The Land Transfer Act, 1875, did not contain the compensation provisions which was regarded as one of its weaknesses.

7 *Principles of Land Registration*, p. 32.

But whether entry on the register of the servient tenement can make it an 'incumbrance' we beg leave to doubt having regard to the wording of section 70 (1). If it is not an 'overriding interest' and not an 'incumbrance', then can it be a registered charge? We doubt this also.

As I understand his views, Mr. Hargreaves is of opinion that a legal easement, as an example of an overriding interest created by a registered proprietor, *must* be by registered disposition, citing section 19 (2), and when so created notice *must* be entered on the register of the servient tenement, citing the same authority. Nobody could deny that section 19 (2) is ambiguous, but against his view are the very express words of section 70 (3) and L.R.R. 41, both of which clearly contemplate a discretion in the registrar to make an entry on the register. This we believe to be the consistent policy of the registry and a practical illustration can be given. On investigation of the register the land appeared to be subject to an easement of way created by transfer, but the plan and verbal description were inconsistent. On application for clarification the land certificate came back altered to the effect 'right of way undefined', which appears to be no right of way at all.

The obligation to make an entry of an overriding interest on the register of the dominant tenement, either to make it a legal easement or to protect it, also seems to be inconsistent with section 70 (3) and L.R.R. 197, 251–258, notwithstanding section 19 (2). Both of these provisions are framed in a discretionary and not an obligatory form and contemplate the possibility of an entry on one register and not on the other. It could scarcely be left to the registrar to decide whether or not the easement was to be created —and if it was, it would be a marked change in the substantive law. Furthermore, Sir John Stewart-Wallace [8] observes on the word 'disposition' in section 19 (2) that, although not expressly stated, it must only apply to those dispositions to which both section 18 and section 20 apply. I think it very doubtful whether section 20 would be construed to include a disposition which simply created an interest falling within section 70 of the Act.

(iii) As another example of my inaccuracy and of the relative unimportance of the classification of 'overriding' and 'minor' interests, Mr. Hargreaves expresses the view that a lease containing an absolute prohibition against assignment can be created as a legal estate without registration: see sections 8 (2), 19 (2); and, as I understand, independently of the classification, because on being granted it will take effect as if it were a registered disposition: section 19 (2). Assuming his view to be correct, it would seem that, in effect, such a lease becomes a registrable interest by statutory magic without registration. This would not affect the importance

[8] *Brickdale* (4th ed.), p. 103.

of the classification, but merely provide an eccentric example of one branch of it.

It should, however, be pointed out that section 19 (2) only applies in this connection to ' a lease made by a registered proprietor under the last foregoing section which is not *required* to be registered or noted on the register '. A lease with a prohibition against assignment is not *allowed* to be registered, and the word ' required ' seems hardly appropriate. Again in *Brickdale* [9] we find a note concerning this passage: ' That is to say, a lease for a term not exceeding twenty-one years at a rent without a fine which is protected as an "overriding interest" by section 70 (1), para. (*k*)'. It may also be noted that section 19 (2) (*a*) specifically refers to the twenty-one year lease and uses the words ' require the entry of a notice '.

It would obviously be wrong dogmatically to deny the accuracy of Mr. Hargreaves' views on this specific point, but it seems to emphasise the great importance of determining both what is within the classifications and how interests are affected.

(iv) My most inexcusable blunder appears to have been perpetrated in connection with section 101, which is the first of several sections affecting unregistered dealings with registered land. It concerns dispositions by any person, whether or not a registered proprietor, having a sufficient interest or power. It enables such a person to create ' permissible interests ' . . . ' in like manner and by the like modes of assurance in all respects as if the land were not registered '. The learned reviewer whole-heartedly rejects a tentative suggestion that this section is concerned with those interests which in unregistered conveyancing are overreachable under the Law of Property Act, 1925, s. 2. This criticism appears to be based on my failure in this connection to consider that part of section 101 (3) which relates to the protection of minor interests by notice, caution, inhibition or restriction, and section 52 (1) conferring special protection where a notice appears on the register and the interests are not, *independently of this Act*,[10] overridden by the disposition.

Although I think that there are more cogent reasons for rejecting this dogmatic view of Mr. Hargreaves, his reference to section 52 (1) scarcely assists his point. Section 52 (1) confers protection for an interest which is not overridden by the general law, such as an interest under a strict settlement. It is true that notices can be used for such an interest in certain circumstances, of which the most obvious is a contract to create such a settlement,

[9] 4th ed., p. 104.

[10] The italics appear in the review. The Settled Land Act is, of course, applicable to registered land in so far as it is not inconsistent. The overreaching principles of the 1925 Legislation are directly or indirectly incorporated into the Land Registration Act, but the word ' overridden ' is employed instead of ' overreached '. Actually the italicised words are unfortunate because the overriding effect of a disposition is laid down in the Act.

commonly called marriage articles,[11] but so soon as a vesting transfer is registered the notice will no longer protect the interest, because it can be overridden by a disposition operating under the Settled Land Act.

At the same time it is doubted whether on the construction of section 101 as a whole all the interests referred to in subsection (3) are included in subsection (1). Subsection (2) provides: 'All rights and interests disposed of or created under subsection (1) shall take effect as minor interests and be capable of being overridden by dispositions for valuable consideration'. There is no suggestion that this 'overriding' is dependent upon lack of 'protection'. Section 101 (3) begins: 'Minor interests shall . . .', but there is no reference to interests created as such under subsection (1), while subsection (6) on the other hand begins 'a minor interest created under this section . . .'.

While for reasons given in the penultimate paragraph it does not seem to determine the question even if subsection (3) does apply exclusively to interests created under subsection (1), since overreachable interests can be protected to a greater or less degree by the methods mentioned in subsection (3), nevertheless, it is worth while to point out also that subsection (5) clearly applies the principle of section 111 of the Settled Land Act to dispositions of settled land under the Land Registration Act. It is an interesting commentary on Mr. Hargreaves' views, both general and specific, that the draftsman saw fit to do so.

While I do not wish to be taken to aver that Mr. Hargreaves' construction of the section is wrong, because I have struggled too long with the statute to feel certain on almost any fundamental issue, I think the essential difficulty arises from section 2 (1) of the Act.[12] Section 2 (1) appears to demand that all interests in registered land *must* fall into one or other head of the threefold category. Section 2 (1) says that minor interests 'shall take effect in equity' and section 101 (3) that they shall 'take effect *only* in equity'. This duplication is confusing, but to this point we will return.

(v) Finally, I was taken to task for neglecting section 107, which also falls into Part IX headed 'Unregistered dealings with registered land'. This section provides that a registered proprietor of a land or charge may enter into any contract in relation to the registered land as if it were not registered when it may be enforced as a minor interest. This, says Mr. Hargreaves, 'not only completes the system of protection but also helps to solve' some of the problems adumbrated in the book under review.

[11] Either a notice or caution would seem to be necessary to render section 13 of the Settled Land Act effective in the case of registered land.

[12] It was really with this provision and not with the definition section that my observations on s. 101, to which the learned reviewer takes such exception, were concerned.

Brickdale [13] puts the situation slightly differently: 'it (the section) constitutes a wide *but necessary* extension of the *statutory powers* of the registered proprietor as such'. This seems to imply that it is not a question of 'protection' but of 'power'. It was necessary, because the effect of sections 69 (4) and 109 prevented the legal owner from having any outside his statutory powers.

Nevertheless, Mr. Hargreaves is of opinion that since a contract *may* give rise to a minor interest our view that an agreement for a lease, which is by definition included in lease, cannot be an overriding interest in those cases in which the lease would be an 'overriding interest'. We would submit that section 107 is not in point here at all. The power to make an agreement for lease must be included in the power to grant a lease conferred by section 18. Even if section 107 did apply we would respectfully suggest that there is nothing to say that a contract may not be enforced as an overriding interest; that section only provides that a contract *may*, not must, be enforced as a minor interest. But apart from all this we find nothing in section 70 (1) (*k*) to exclude the definition clause (section 3 (*x*)) from that paragraph. It therefore seems difficult to introduce section 107 *ab extra*.

Likewise, objection is taken to a suggestion, thrown out but rejected,[14] that an unregistered transferee *in occupation* might have an overriding interest. Mr. Hargreaves observes: 'the only right which in either case (agreement for a lease or unregistered transfer) can bind a purchaser is the right to enforce a contract against him and this is a minor interest'.

So far as the agreement for a lease is concerned it is not disputed that the right is one in contract, subject to the rule in *Walsh* v. *Lonsdale*, but if made for valuable consideration an unregistered transfer appears to create an equitable interest and is more than a contract, so that in any event section 107 does not apply. In the first place the power to execute a transfer must, it is thought, clearly fall within section 18, and hence the power conferred by section 107 is unnecessary. In the second place section 89 (1), which applies to unregistered instruments, only makes such an instrument void in so far as the disposition is effected by a registered disposition. If it is not void we find it difficult to see how it can operate only as a contract. Were it so then voluntary transferees would be in a difficult position having regard to the equitable principles relating to incomplete gifts.

As I understand the position, though it may not be free from ambiguity, the effect of registration is to vest in the transferee the legal estate: section 69 (1); and all statutory incidents attached to it by the Act. Subject to this the execution of a transfer operates to vest in the transferee an equitable interest in the estate

[13] 4th ed., p. 254: italics are ours.
[14] See pp. 40, 41, though Mr. Hargreaves does not appear to notice the rejection.

of the transferor. Were it only a contract questions of specific performance and the like would arise. It is conceived that this is not the case.

These are the errors, as we understand, which arise from a failure to take the view that the Land Registration Act is a conveyancing Act and is to be construed as far as possible as if no change in the substantive law resulted. No doubt there may be others, but as these were the matters selected by the reviewer for criticism it is assumed that they were the most heinous. Nevertheless, it may be convenient to add here that, though we have cited Sir John Stewart-Wallace once or twice to support a view in opposition to that of Mr. Hargreaves, it is only right to add that his general sympathy would be with the view that the substantive law has not been materially affected. Furthermore, it should be conceded that the onus is clearly upon the party setting up any change.

At the same time we are mildly surprised that one so learned in our legal history should enter so strong a protest against a method of construction that seems to be ingrained not only in our Common Law but also in our methods of legislation. To quote the Town and Country Planning Act, 1947, as a reminder that the land law is something more than the handmaiden to conveyancing seems to overlook that this too is a procedural Act with unknown, and indeed controversial, effects on the substantive law. In substance it follows precisely the same methods as the Land Registration Act, but it was heralded by the Minister of Town and Country Planning and by the Lord Chancellor as working a revolution in land tenures. Nevertheless, we have encountered considerable criticism for accepting this view and suggesting that ' development value ' or ' all uses but the permitted use ' are vested in the State, because nowhere in the Act is any interest specifically transferred.[15] In any event whatever substantial changes have occurred in the substantive law are ' secreted in the interstices ' of the rules governing planning permissions and development charges, themselves primarily procedural.

The fact remains that our legislators do not like making alterations in substantive law by laying down broad substantive principles. In the land law this is most marked. Whatever criticism may be offered of *Re Kempthorne* a striking example is to be found in the law relating to remainders. Notwithstanding that the Law of Property Act, 1925, s. 4 (1), provides that legal interests capable of being created as legal interests can subsist in equity it is commonly assumed that the rules governing legal contingent remainders have been abolished. So, for example, a remainder to the first son of A to become a lawyer would be invalid today

[15] On the other hand the advertisements of the Central Land Board, issued presumably under the auspices of another learned lawyer, categorically affirm that ' development value ' is transferred to the State.

though, of course, valid if created before 1926. Yet, apart from the rule in *Shelley's Case*, which is not abolished but varied, and the rule in *Whitby* v. *Mitchell* there is no specific provision varying the rules for legal contingent remainders. Indeed, this only carries on the changes made, but not probably intended, by the Land Transfer Act, 1897: *Re Robson* [1916] 1 Ch. 116.

Again, the Settled Land Act, 1925, for procedural reasons has introduced two distinct forms of the estate *pur autre vie*. If an estate *pur autre vie* is created under a trust instrument, the tenant, though entitled in possession, has no rights over the land, broadly speaking, unless and until he becomes the legal estate owner *in fee simple* by virtue of a vesting instrument. If the estate *pur autre vie* is created by assignment of a life interest created under a settlement, he cannot normally ever become a legal estate owner under the Settled Land Act, s. 106, but he is entitled to all the rights which he would have had as legal owner of the estate *pur autre vie* before 1926: section 111; and this apparently is independent of the person in whom the fee may be vested though, of course, subject to the overreaching powers of the estate owner, whomsoever he may be.[16] This peculiar feature is so well 'secreted' that books on Real Property are apt to neglect it. It is of the greater interest in this particular connection because, as we have already noted, this provision has in fact been repeated in connection with settled land under registered titles: section 101 (5). The machinery results in a substantive distinction.

The fact is that interests in land conferring rights and powers, whether of enjoyment or disposition, have no real existence. They exist only in the eyes of the law and are, therefore, determined inevitably by the legal powers of creation and disposition. These powers are and, it seems, can only be known by the methods which can be employed, and changes in method may be expected to result in changes of substantive law unless very careful steps are taken to avoid them. Even where this occurs, as in our examples of section 4 (1) of the Law of Property Act, and section 111 of the Settled Land Act, it does not follow that change is avoided. Furthermore, it is thought that an attempt to avoid the natural consequences of these procedural changes is just as likely to result ultimately in incongruity as an opposite method of interpretation. Indeed, we should say that the chances were higher. A simple illustration is to be found in the uncertainties and problems introduced by the decision in *Re Bridgett and Hayes' Cont.*[17]

[16] It is true that the Settled Land Acts, 1882–90, had conferred powers upon one type of estate *pur autre vie* and not upon the other: Settled Land Act, 1882, s. 50; but this did not alter the rights of the legal tenant *pur autre vie* in respect of the land except, and in so far as, his estate *in the land* was defeated by the exercise of the statutory powers. In any case this only illustrates the process of change by legislative alterations in the machinery of conveyancing. A method at least as old as the Statute of Uses.

[17] [1928] Ch. 163 : this most convenient decision leaves a legacy of many problems.

It is true that there are large tracts of the land law which are little concern of the conveyancer. They are principally matters affecting the enjoyment of *land*—not, be it noted, of interests in *realty* as such. In the main they are determined by the law of tort, with occasional excursions into the law of contract, but this part of the law also has very little to do with those interests with which the conveyancer is concerned. Enjoyment is usually protected by trespass, nuisance, and liability in respect of dangerous premises or the rule in *Rylands* v. *Fletcher*. These grounds of liability primarily depend upon possession or occupation, though in some cases an *owner* (note the vagueness of the term) may be liable, as a lessor in nuisance, or be able to recover for 'damage to the reversion'. It is not without significance that the Town and Country Planning Act, 1947, mainly concerns an 'owner' and an 'occupier', and land is for all but Part VI defined as a 'corporeal hereditament', whatever that may mean in the particular context—it certainly does not depend upon its meaning in conveyancing language.

Without very substantial amendment it would probably be impossible satisfactorily to state the rules governing rights and liabilities in land under any single straightforward classification of interests in land. This is probably due to the fact that the conveyancing side of the land law has been developed by conveyancers, including by the 'practice of conveyancers', upon principles markedly different in background and character from the other branches of the Common Law. This may be illustrated from a topic which touches both aspects, namely, the law of waste.

Waste is still dealt with in books on Tort because there was an action for waste at Common Law, which in time came to be an action on the Case replacing the old Writ of Waste. Nevertheless the practice of making limited owners unimpeachable for waste and the intervention of the Chancery has long ago made it a topic primarily for the property lawyer. Furthermore, the various forms of equitable interference left the law far from clean cut, but before 1926 it would generally have been said that a tenant of the legal estate in fee simple would not be liable for waste. Trustees might in equity be restrained from doing acts which in a tenant for life would have been waste, but if they were expressed to be without impeachment of waste, they would still be required to behave as trustees: *Marquis of Downshire* v. *Sandys*.[18] By the Settled Land Act, 1925, a life tenant is an express trustee of the legal estate in fee simple. Following Mr. Hargreaves' approach to the Settled Land Act, 1925, the courts have *apparently* applied to the life tenant, who is a legal trustee, the old law of waste: cf. *Re Harker's Will Trusts*,[19] *Re*

[18] 6 Ves. 521.
[19] [1938] Ch. 323.

Fitzwalter.[20] This may be correct in one sense, but it has the effect of altering the law, since a tenant in fee simple may now be liable to common law waste. We forecast that this will in time at least have repercussions on all forms of limited ownership in equity. This change affects beneficial ownership primarily, though the change was in conveyancing form.

Had *Re Kempthorne*, referred to by Mr. Hargreaves, been decided differently and it had been held that statutory trusts for sale did not operate to effect a conversion, this would not substantially have altered the fact that a conveyancing change operated to alter the substantive law. *Either* it would mean that an imperative direction to sell [21] might in some circumstances leave the beneficial interest realty or a trust for sale would not be an imperative direction to sell, which would defeat the purposes of the Act. This latter point can be emphasised by another indirect and probably unintentional effect of the trust for sale, namely, its overriding effect on some beneficial interests, such as options to purchase, cf. *e.g.*, *Re Flint*,[22] *Re Davies' Will Trusts*.[23]

The essential point of these illustrations, and they could be multiplied, is that the conveyancing form must either operate illogically and without certainty, or else it must control the character of the beneficial interests created or disposed of by it. If this is once admitted then the procedural form can only be altered by legislation, and not affect the substance of the law provided that sufficient substantive provisions are made, and these will affect the *character* of the procedural form. Omission cannot logically prevent the type of interpretation which Mr. Hargreaves dislikes. Only very precise and definite provisions can hope to do it and even they do not always appear successful.

The fact seems to remain that, whether we like it or not, the courts will construe a conveyancing or procedural statute according to the effect that *form* may have on *substance*. This may be less the case than formerly, but it remains largely true. Furthermore, it may not be so wide of the mark as it appears at first sight, because on the whole that way some degree of certainty lies. But in the particular issue under discussion the statute is not free of at least one provision which goes to the root of substance and to the root of the disputed classification of interests in registered land. In the main the Land Registration Act was an Act 'to consolidate the Land Transfer Acts and the statute law relating to registered land'. Hence we cannot disregard altogether the approach to the Land Transfer Acts to be found, for example, in *Capital and Counties Bank* v. *Rhodes*. Nevertheless, section 2 (1) is a new section and, as has already been pointed out, it

[20] [1943] Ch. 285.
[21] See *Re Mayo* [1943] Ch. 302.
[22] [1927] 1 Ch. 379.
[23] [1932] 1 Ch. 338.

provides that 'estates capable of subsisting as legal estates shall be the only interests in land *in respect of which a proprietor can be registered* and *all other interests* in registered land (except overriding interests . . .) shall take effect in equity as minor interests . . .'. It is thought that this is a clear statement of a principle of substantive law: interests in registered land *must* fall into one of three categories. The peculiar features of these separate categories emerge in the course of the Act; not always with the clarity that could be wished, but they do emerge. It should be pointed out that the first class, namely those of which a *proprietor* can be registered, is very strictly limited. 'Proprietor' is defined (section 3 (xx)) to mean 'the registered proprietor for the time being of an estate in land or a charge'. Respectfully it is suggested that there is nothing in the Act which suggests that an easement noted against the servient owner is a right of which there is a registered proprietor: cf. L.R.R. 258. Since they are not incumbrances probably they cannot be a 'charge'.

But we do not wish to follow side issues here because the main issue is vital. Assuming that interests in registered land *must* fall within one of those three categories, it is vital to ascertain the extent and characteristics of those categories as a guide to the whole of the land law. That this may effect changes in the nature and even existence of interests in land is, perhaps, unfortunate, but this is no ground for treating these categories other than as a primary classification. Furthermore, it seems inevitable that any rule affecting an interest in land which is inconsistent with the rules governing the particular category into which the interest falls must be treated as abolished. In these circumstances it is the more to be regretted that so little attention was subsequently paid to substantive law. This was due in part to the fact that the Land Registration Act is, in fact, both a consolidating and an innovating statute. The bulk of the provisions are substantially those of the Land Transfer Acts and by a curious fate that seems to dog the 1925 legislation the old wine does not always go well in the new bottle as is so particularly evident in the Settled Land Act, 1925. But surely one thing is clear—the Act does not do more to keep alive the old Common Law and equitable interests independently of the register, it does less. Consequently we re-submit with respect that in books on Real Property, that is books designed for those concerned with the land law as affected by conveyancing, it will be desirable, when registration is generally compulsory, to rewrite them in such a form that they will resemble the cardinal facts as they will then exist. The land law will have to be approached from the standpoint of the threefold classification to be found in section 2 (1) and the precise content of these classifications ascertained as the frame to which all interests in land must conform.

Harold Potter.

REPORTS OF COMMITTEES

COMMITTEE ON THE LAW OF DEFAMATION : THE PORTER REPORT (Cmd. 7536/48)

THE long-awaited Report of the Committee, appointed in March, 1939, under the chairmanship of Lord Porter, ' to consider the Law of Defamation and to report on the changes . . . desirable ' in the existing law, practice and procedure, was published recently. The war interrupted the Committee's deliberations, but their Report shows that they have carried out what was a ' task of some magnitude ' with considerable care and thoroughness. The Committee held seventy meetings, and gathered together from individuals and organisations fifty-three written memoranda, which were supplemented in many cases by oral evidence. In addition they commissioned four special surveys of the law of defamation in other countries. The result of this ' long and exacting ' work is a Report which the Committee modestly describe as ' not spectacular ' but ' at least . . . an attempt to simplify and improve the methods under which redress is to be obtained, and the grounds upon which it is to be granted '.

The recommendations of the Committee cover fifteen different topics relating to the substantive law of defamation and matters of practice and procedure. It is not proposed to enlarge upon each of these topics within the compass of this review—the reader is referred to the Report itself for further and better particulars—but an attempt will be made to single out the salient features of the Report and comment upon them. On the matters of practice and procedure, there is a useful article by Mr. Neville Faulks in *The Law Journal*, Vol. 98, p. 611.

The Committee turned down proposals for extending the scope of the law of defamation to cover the invasion of privacy, group defamation, and defamation of the dead.

It has been urged by several writers [1] that our law should provide protection against ' the abuse of rights ', and in particular against ' the offensive invasion of privacy '. But so far the discussion has been mainly [2] confined to academic writers, and it is, therefore, of considerable interest to have the views of this pre-eminently practical Committee on the matter. It is against the Press that charges

[1] Winfield, *Law of Tort*, 4th ed., at p. 15 and p. 631 *et seq.*; also the same author in 47 L.Q.R. 23 and 326. Professor Gutteridge and Professor Walton in 47 L.Q.R. 203; Professor Gutteridge in 5 Camb.L.J. 22.

[2] There are a few cases in which the matter has been discussed in the courts. See Winfield, *loc. cit.*

of infringement of privacy are frequently made.[3] The complaints are two-fold, namely, in the first place, the pursuit of objectionable means of obtaining 'sensational' information about the private lives and affairs of persons who are in the news, and secondly, the publication of such information. The real remedy lies with the Press, as the Committee point out, for the matter is in fact 'one of internal discipline' and 'good taste'. Moreover, the law of libel and slander affords only a very minor degree of protection against this abuse, and the Committee doubt whether it 'properly falls within the scope of the law of defamation'. With regard to the seeking of interviews and the other means of obtaining information, they fall outside this branch of the law—'the matter clearly bears no relation to the law of defamation'. Professor Winfield, in describing the scope of infringement of privacy, is careful to state that 'it differs from defamation in two respects. It does not necessarily affect a person's reputation as that word is understood in the law of libel and slander; and it need not be a "statement" of any sort, *e.g.*, staring in the window of a private house'.[4] With regard to the actual publication of the details, this is not normally defamatory, and the Committee do not consider it expedient to propound an extended definition of libel so as to restrain improper invasion of privacy. Such an extension might interfere with the due reporting of matters of public interest. The Committee do not, however, rule out the possibility of creating a legal remedy, but consider that this lies outside their terms of reference. Professor Winfield has suggested that it is still open to the House of Lords to decide that there is a remedy by way of an independent tort of offensive invasion of personal privacy.[5] It now seems clear that the law of defamation is not to be extended to include such protection. Some cases like *Tolley* v. *Fry*,[6] which appear to provide an indirect remedy for infringement of privacy, will no doubt continue to find protection within the boundaries of libel law, but this does not prove the case for the extension of libel to cover other cases.

The 'great difficulties in formulating an extended definition', which the Committee encountered in considering the question of infringement of privacy, apply with even greater force when they come to consider Group Defamation, *i.e.*, 'false statements vilifying not identifiable individuals, but groups or classes of persons distinguishable by race, colour, creed or vocation'. Outside seditious libel, there is at present no remedy for such false statements, and the Committee do not propose that one be provided.[7] Any attempt

[3] *E.g.*, *The Daily Mirror Press Photographer Libel Action*, described in *Privacy and the Press*, Butterworth, 1947.
[4] Winfield, *Law of Tort*, p. 631.
[5] *Ibid.*, p. 15.
[6] [1931] A.C. 333. Also *Dunlop Rubber Co., Ltd.* v. *Dunlop* [1921] 1 A.C. 367.
[7] *R.* v. *Leese and Whitehead* (*The Times*, September 19 and 22, 1936), provided a criminal remedy by way of public mischief, but this case has been doubted. See *Modern Approach to Criminal Law*, p. 76.

to extend defamation to cover such Group Defamation would involve laying down a definition which would in all probability discourage ' perfectly proper criticisms of particular groups or classes of persons ', and curtail ' free and frank . . . political discussion and criticism '. The Committee ' consider that the law as it stands affords as much protection as can safely be given ', and remind us that ' the law of seditious libel still exists as an ultimate sanction '. Yet they are forced to admit that ' save in the most flagrant cases ' such a criminal prosecution is unlikely to succeed, in view of the traditional antipathy in this country towards anything savouring of a political prosecution.[8] This reminds one of the reply given by the Home Secretary on September 18, 1947, to a deputation from the London Trades Council, which expressed concern at the revival of Fascism and anti-semitism in the East End of London, and urged upon him the desirability of ' banning Fascist meetings and anti-semitism '. Mr. Chuter Ede is reported to have said that ' a difficulty about the banning of Fascist organisations and meetings was to define the doctrines peculiar to Fascism without making other political associations unlawful '. He also said that the law of sedition was available, and that ' the preaching of racial and religious hatred could be sedition '.

Of course, when the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue for defamation,[9] the true test in such cases having been clarified in the House of Lords in *Knupffer's Case* in 1944.[10] But it is a wider liability than this that is contended for under the heading of Group Defamation, and the Committee are clearly of the opinion that the present rule should stand—to use Lord Porter's words in the above case, the rule is that ' a class cannot be defamed as a class nor can an individual be defamed by a general reference to the class to which he belongs '.[11]

The changes wrought by the Law Reform (Miscellaneous Provisions) Act, 1934, in abolishing the rule *actio personalis moritur cum persona* did not extend to rights of action in defamation. The Committee decline to recommend any change in the existing rule that, so far as defamation is concerned, there is no survival of rights of action, and consider that the Act of 1934 was right to recognise ' the essentially personal character of a man's right to his good reputation '.

The refusal to recommend that slander be placed on the same footing as libel and made actionable per se in every case is not so acceptable as the above three refusals with regard to the scope of the law of defamation, especially in the light of the approval of

[8] Cf. the prosecution and acquittal of James Caunt, on August 6, 1947, for an article in the *Morecambe Advertiser*.
[9] Salmond, *Law of Torts*, 10th ed., p. 379.
[10] [1944] A.C. 116.
[11] *Ibid.*, at p. 124.

assimilation by a Select Committee of the House of Lords in 1843, and the dissenting opinion of two members of the present Committee. It is the contention of these members, Mr. Richard O'Sullivan, K.C., (the learned editor of *Gatley*) and Professor E. C. S. Wade, that 'no adequate reason now exists for perpetuating a distinction which originated by an accident of English legal history, finds no place in Scots law, and has led to a confusing volume of case law'. They point out that 'for more than one hundred years, there has been a substantial body of legal opinion in favour of assimilation'. The majority on the Committee say in reply that 'if all slander were actionable per se, the scope for trivial but costly litigation might be enormously increased',[12] and that the present rule, together with the exceptions where slander is actionable per se, though 'arbitrary and illogical', is not amiss 'as a working rule', and forms a 'not unsatisfactory compromise'.

Yet unless he can bring his case within the categories of slander actionable per se, a person whose reputation is sullied by slander is at present often without redress, because of the necessity of proving special damage. On the Committee's own admission, 'it is, in practice, difficult to prove special damage in any action for defamation. A man's reputation as a private individual or in the way of his calling may have suffered grievous harm without its being possible to prove any direct pecuniary loss'.

The hardship thus arising may be partly met by the proposed extension of one of the categories of slander actionable per se, *viz.*, words spoken of the plaintiff in the way of his calling. The proposal is that any words naturally tending to injure or prejudice the reputation of the plaintiff in his office, profession or trade should be actionable per se, whether or not they are spoken of him in connection with his work. We are glad to think that the law as explained in *Jones* v. *Jones* [13] may be abrogated, so that persons like Doyley [14] need no longer languish 'without redress' on (or off?) the course at Doncaster, entirely at the mercy of their slanderers! This welcome change will go a long way towards placing slander on a footing with libel, but it still leaves the person who has no 'office, profession or trade' to prove special damage. What of the housewife slandered in respect of management of the household, or the professional man who has retired?

The Committee do not refer to the effect of this proposal on the distinction between libel and slander, although it will clearly make many more slanders actionable per se. Furthermore, they do not discuss the line drawn between offices of profit and offices of honour in this connection, nor the rule making

[12] Cf. The Legal Aid and Advice Bill, which specifically excludes actions for defamation from its provisions for the time being in order to avoid flooding the machinery with numerous actions of this kind.
[13] [1916] 2 A.C. 481.
[14] *Doyley* v. *Roberts* (1837) 3 Bing. N.C. 835.

an imputation of immorality against a clergyman actionable per se provided that he is a beneficed clergyman, but not otherwise. They recommend no alteration in the rules governing the other three categories of slander actionable per se, and no addition to the present categories. Imputation of crime is dismissed in three-and-a-half lines, and with regard to imputation of disease no acceptable alternative definition could be found, so that the matter is to be left as it is, in an unsatisfactory and anomalous condition, undisturbed by any recommendation. Once more the Committee appear to be obsessed with the difficulty and danger of a new statutory definition.

The hardship of the present law of slander is already being side-tracked by the tendency to regard defamation by means of new media of publication, such as talking films,[15] gramophone records,[16] and broadcasting,[17] as giving rise to libel, though a strong case might be made for regarding each of these as slander. The distinction between libel and slander is becoming blurred in the process. The familiar tests of ' permanent-transient ' and ' appeal-to-the-eye/ear ' are strained, and the question of the size of the audience reached by the defamation, which is implicit in the first test mentioned, is being more and more stressed. The Committee, while adopting the first test in § 33, mention the size of the audience as a further criterion in § 36, and it is this consideration, ' the audience of many millions ', which is uppermost in their minds when they recommend that broadcasting of statements and images be treated henceforth as libel.[18] Television appeals, like the talking film, to both eye and ear, but is essentially transient, since presumably it cannot be repeated in the same way as a talking film or recorded broadcast programme. However, it comes within the terms of the above proposal. The perpetuation of the present libel/slander dichotomy, coupled with the widening of the rule as to slanders actionable per se, and the tendency to resolve classification doubts in favour of libel,[19] are calculated to emphasise to a greater extent the hardship of those who still have to prove special damage to establish a claim in slander.

The proposal to eliminate the injustice of the present law with regard to ' unintentional defamation ' of the *Hulton* v. *Jones*[20]

[15] *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934) 50 T.L.R. 581.

[16] There is no decision on this. Academic opinion favours regarding records as giving rise to libel; Stallybrass, Landon, Gatley and Button take this view. Winfield regards them as involving ' potential slander '.

[17] Broadcasting has been regarded as slander in this country (*Bergman* v. *Macadam*, *The Times*, October 8, 1940), and in Australia. In America the law is otherwise. The Committee appear to have overlooked the *Bergman Case*, for they say that this matter ' has not been the subject of any English decision '. Cf. Winfield, *op. cit.*, p. 244.

[18] Button, *Law of Libel and Slander*, 2nd ed., p. 13, also mentions this consideration.

[19] Cf. a parallel trend noticeable in the approach to Slander of Goods and Slander of Title. See the Committee's recommendations, § 50–54.

[20] [1910] A.C. 20.

variety, while at the same time to retain some protection for the person innocently defamed, has been widely noticed and warmly received as one of the Committee's most important recommendations. To substitute a subjective test of intention for the present objective one would, in the Committee's view, be ' a facile remedy ', leaving ' a person who has a really genuine grievance . . . without any kind of redress '. Yet the retention of the operation of the objective test of ' the fact of defamation ' in its present unqualified form could not be defended. The Committee pursue a *via media* which on the face of it seems quite attractive. They recommend that unintentional defamation should be excused provided that the defendant has taken all reasonable precautions to ensure that what he proposes to publish is not defamatory, that there should be introduced a special defence of ' correction and apology ' in such cases, and that no damages should be payable if these facts are proved. The precise form of the correction and apology should be settled in cases of dispute by application to a High Court judge. This defence of apology should be quite distinct from that already available in mitigation of damages.

The Committee are aware that ' the practical and procedural application ' of this idea ' presents difficulties ', and refer to the obvious case of the plaintiff who contends that the defamation is not ' unintentional ', either because of the defendant's actual intention to defame, or, more often, because of a lack of reasonable care on the part of the defendant. They provide for this in two ways. In the first place, where a plaintiff has accepted an offer of correction and apology, he should be debarred from further action. Secondly, where he has not accepted such an offer, the fact of its having been made should constitute a defence to the action ' unless at the trial it appears that the defendant was guilty of an intention to defame or of lack of reasonable care '. This raises several queries. Must the plaintiff take the defendant's word that the publication was ' unintentional ' or go to trial and take the risk of paying the costs of the action when the defendant establishes that the defamation was in fact unintentional? Again, supposing a defendant prefers to go to trial without making an offer of correction and apology—possibly because he denies that the statement in question is defamatory, or because he denies publication—and at the trial he is found to have published a defamatory statement, though without intention or negligence on his part, is a ' correction and apology ' to be available to him at this late stage? It will be interesting to see how the legislators translate this proposal into statutory form.

The Committee's recommendations for widening the defences to actions for defamation (the law relating to which had become ' unnecessarily complicated ' and technical) should go a long way towards meeting the complaints of litigants and the profession. To establish ' substantial ' truth or fairness is suggested as sufficient for a defence of justification or fair comment. The proposed extension

of the qualified privilege of a newspaper under the Law of Libel Amendment Act, 1888, to cover monthly publications, and the redefinition of the list of reports entitled to such privilege, are both welcome proposals. With regard to joint tortfeasors, the Committee recommend the abolition of the rule that the malice of one of several joint publishers infects them all, so as to defeat a plea of qualified privilege or fair comment, and also the rule that taking money out of court which has been paid in by one operates as a release of all. Wider powers are sought for bringing in matters in mitigation of damages.

On the procedural side, the Committee ' have suggested a large number of alterations which (they) regard as important in simplifying and improving the necessary procedure, and, in particular, in the case of those preliminary steps which have led to unnecessary expense and a too meticulous inquiry as to the defendant's state of mind '.

The general impression given by this Report is that it is very much a product of the common law outlook. The refusal to extend the scope of defamation or to assimilate slander to libel, the caution with which the Committee approach any matter which might involve a statutory definition, the satisfaction expressed with the flexibility afforded by the system of case law as opposed to the dangers of codification of the law of defamation—these are noteworthy features of a Report which positively exudes the common law on every page.

E. Hall Williams.

Report of the Army and Air Force Courts-Martial Committee, 1946 (Cmd. 7608)

1. *Terms of reference.* To bring under review in the light of the experience gained in the late war and of the composition of the Army and the Royal Air Force, the recommendations of the Army and Air Force Courts-Martial Committee, 1938 (Cmd. 6200), with special reference to the question whether it is desirable to provide any, and if so what, form of appeal from the findings or sentences of courts-martial; to investigate the powers of courts-martial and of commanding officers to award punishment and the nature and scale of such punishment; and to make recommendations upon these and kindred matters. The chairman was the Hon. Mr. Justice Lewis and the other seven members were four M.P.s (two being K.C.s and one being a Brigadier), an Air Marshal, a Major-General and the Director of Public Prosecutions.

2. *Summary of principal recommendations.* (a) The Judge Advocate-General should be appointed on the recommendation of the Lord Chancellor, to be responsible to him and to be renamed ' Chief Judge Martial ' (C.J.M.); the status of the C.J.M. should

be not less than that of a puisne judge of the High Court, except that he should normally retire at seventy and that Parliamentary addresses should not be necessary for his removal. His functions and those of his assistants, under this recommendation, should be primarily judicial and the prosecuting functions of the present J.A.G.'s office should be transferred to separate departments under the Secretaries of State for War and Air. It is suggested by the Committee that the office of the C.J.M. might include a Vice-C.J.M., thirteen Judges Martial (JJ.M.) and thirteen Assistant Judges Martial (A.JJ.M)—all civilians.

(b) Appeal should lie on questions of law against conviction, when the accused pleaded Not Guilty, to a new Courts-Martial Appeal Court consisting of C.J.M., Vice-C.J.M., the JJ.M., and a panel of approved K.C.s who are willing to sit. Any three should constitute a court which should have power to quash a conviction for error of law unless satisfied that no substantial miscarriage of justice had occurred. The court-martial itself could grant leave to appeal; otherwise the accused could apply within fourteen days, specifying the grounds, to the C.J.M. or appropriate J.M., with further right of applying to the Appeal Court itself. On appeal, the accused should have the right to be present in capital cases and in other cases by leave of the Appeal Court. The right to petition the Sovereign should remain. Finally, there should be a right of appeal to the Judicial Committee of the Privy Council on the Attorney-General's fiat on important points of law.

(c) Jurisdiction over *sentence* should remain entirely with the Service authorities with no right of appeal to a civilian or military tribunal.

(d) (i) General Courts-Martial should be composed of a J.M. (or Deputy J.M.) and five officers being Lts. or F./O.s or above. The J.M. would preside and would be sole judge of questions of law, would sum up and direct on law. The officers would decide guilt or otherwise and for this purpose would retire without their president who would, however, retire with them to decide sentence.

(ii) District Courts-Martial: for the less serious cases, there should normally be permanent presidents appointed for a number of years from officers due for retirement; the jurisdiction should be limited to offences for which the maximum punishment is imprisonment and to soldiers and airmen below the rank of W.O.; normally such a court-martial should not have power to imprison for more than six months and never for more than twelve months. As at present, at least two other officers should sit with the president. For the more difficult cases (where at present a judge advocate assists the court), an A.J.M. should preside; he would not sum up and would have an equal voice with other members of the court as regards finding and sentence.

(iii) Field General Courts-Martial should be renamed Emergency Courts-Martial and be permitted only when it is not 'possible' (at

present, 'practicable') to convene a G.C.M. or D.C.M.; there should be a right of appeal save in very exceptional circumstances.

(e) So long as judge-advocates are retained, they should not accompany the court on retirement to consider findings. (This has already been put into effect.)

(f) Findings of guilt and sentences should be announced in open court as soon as determined. (Also already put into effect.)

(g) Findings of guilt and innocence should be unanimous with the right of the accused to retrial on disagreement.

(h) Accused should have the right to petition the C.J.M. against continued detention after being in close arrest for twenty-eight days without a court-martial having been convened. It should be made illegal for accused to be retained in close arrest without trial for more than ninety days.

(i) Legal aid should be obtainable before the accused appears in front of his C.O. on a charge which may be tried by court-martial.

(j) In less serious cases, the C.O.'s précis of evidence should replace the Summary of Evidence; a copy of the précis should be given to the accused not less than forty-eight hours before the trial commences. The officer detailed to take the Summary should be appointed by the convening officer and be a permanent president or other officer with suitable experience or legal qualifications. The accused should be entitled to have a representative with all rights and duties of counsel present at the taking of the Summary.

(k) Finally, the Committee recommended that the present powers of a C.O. to award twenty-eight days' detention or (on active service) field punishment should be retained and that a new punishment for all ranks should be introduced—reduction to a penal rate of pay—and that courts-martial should have power to reduce an officer in rank.

3. *Comment.* Two years ago, when this Committee was first set up, I traced in an article in this *Review* some of the difficulties which face a private soldier charged with desertion. How would he be affected if all the recommendations of the Committee were adopted?

First, he would be entitled to legal advice *before* he stands in front of his C.O. and *before* the Summary of Evidence (if any) is taken. This is a real advance, small though it may seem. Second, he will not be entitled as of right to a Summary of Evidence; this is no loss to the accused and he gains by the recommendation that the officer who takes the Summary should be appointed by the convening officer; he further gains by the recommendation that his representative should be present with the rights and duties of counsel. Third, he will be tried by a District Court-Martial presided over by a permanent president, and the finding and sentence will be pronounced in open court forthwith on their determination.

Fourth, if he pleaded Not Guilty, he will have a right of appeal on a question of law against his conviction; he will be rather handicapped by the fact that no reasons are given by a court-martial for the decision.

There can be no doubt that the recommendations of the Committee summarised above in para. 2 would effect a considerable improvement in the present system. But there are, it is suggested, two most important matters which are not dealt with. The first is the problem of defending officers. The Committee recognised that the system was unsatisfactory before the war but noted that a new scheme is now in operation for the provision of competent legal aid without regard to rank (but subject to practicability and means) on a contributory basis whenever necessary in the interests of justice (a) in cases of the same type as those which would come before criminal courts, and (b) in the case of purely military offences, where a legally qualified prosecutor is employed, or which involve points of legal difficulty, or expert examination of witnesses, or where the results of the case are of considerable consequence to the accused. This scheme is alternative to the application for a defending officer who will no doubt continue to be required for the great majority of cases. It is not clear why the Committee failed to deal with the problem of how sufficiently competent officers were to become available especially since they observed how necessary was experienced and sympathetic advice to a young first-offender. There is little value in urging commanding officers to ensure that the accused is advised by a 'suitable', 'competent' person. Suitable and competent legal advisers are made, not discovered. Courses should be provided and qualifications given to the right type of officers who acquire the necessary knowledge. The second problem not tackled is that of the nature of the permanent president. As noted above, the Committee recommend that, in less serious cases, District Courts-Martial should be presided over, normally, by permanent presidents. Unfortunately, the Committee recommend that these presidents be recruited from officers due for retirement. The dangers of such a method are obvious. Many retiring officers have not been with battalions or squadrons for years, and will be out of touch. The attitude of mind of these presidents will considerably influence the development of the service and it seems likely that the system will have most of the shortcomings and few of the advantages associated with J.P.s. Younger men are needed, qualified by training to act as presidents, acting as such in their turn and then returning to their units.

I suggested in my earlier article that in the last resort justice in the army must give way to the need for discipline. The Committee apply this principle when deciding that there should be no right of appeal against sentence. 'The final word upon punishment must, in our opinion, remain with the service authorities,

upon whom the duty of maintaining discipline is laid '. In other words, Pte. Snook in Jan., 1949, decides to go away for a short holiday with his girl and because his leave is not due and she cannot postpone her fortnight's freedom from the office, Pte. Snook decides to ' go absent ' for a fortnight. Very reprehensible. . . . Pte. Snook returns after his fortnight (plus a couple of days to screw up his courage), is duly charged with absence without leave and receives his few weeks of detention. In the course of 1949, the number of days lost per month through military ' absenteeism ' shows a steady increase. It must be stopped. In Jan., 1950, Pte. Koons, who sleeps in the next bed to Pte. Snook, follows the latter's example of a year before. But when he returns, it is to face a charge of desertion. The intention is to make examples of a few unfortunates and the consequences of being found guilty of desertion are far more serious (apart from length of sentence) than those of being found guilty of absence without leave. Discipline demands ' desertion '. Justice demands ' absence without leave ' (because Koons, like Snook, intended to return). Discipline, I am sure, will remain standing in the field whence justice has fled. And, socially, perhaps it should be so. It will be rare that the Appeal Court will find that the court-martial could not reasonably have found evidence of an intention to desert. Koons is upset and Snook, who had intended to repeat his 1949 jaunt, thinks again and decides she is not worth it. Sentence sometimes determines finding and where this is so the distinction between appeals against conviction and against sentence falls to the ground.

In conclusion, we may note the suggestion of one member of the Committee, in an addendum dissenting on this point, that Other Ranks should have the right to demand the presence of one N.C.O. (or W.O.) as a member of a court of three persons and two N.C.O.s (or W.O.s) where the court numbers five. ' The proposal . . . seriously perturbed the senior officers of the Army and Royal Air Force ', runs the Committee's Report. These officers regarded courts-martial as ' one of the instruments of discipline ' and attached great importance to ' maintaining strictly the status an officer has hitherto enjoyed '. Courts-martial as courts—or instruments of discipline? Comradeship or unquestioning obedience? Which results in greater efficiency? Finally, perhaps, one comes down on the side of the senior officers and the big battalions—but with half a feeling that this time the angels are in the trenches opposite.

Legislation to put into effect the major recommendations is to be deferred, pending an inquiry into naval courts-martial procedure.

J. A. G. Griffith.

NOTES OF CASES

LARCENY AND THE FORMATION OF A FELONIOUS INTENT AFTER TAKING POSSESSION

SHORN of the complicating factor of the respondent's intoxication, the facts of *Ruse* v. *Read* [1949] 1 All E.R. 398, are as simple as the points of law involved are interesting. The respondent who, according to his own evidence, had been drinking a quantity of beer and rough cider, visited a fair in the evening and, on leaving, took a bicycle which was resting against some railings. He rode on it for some two hours, and proceeded with it to the house in which he was staying. Next morning, he was confronted with the problem of disposing of the bicycle in such a way as to conceal his behaviour on the previous evening. He accordingly took it to the local railway station and arranged for it to be dispatched to York without any intention of collecting it at its destination. The bicycle was, however, discovered at the railway station, and the respondent was charged with its theft before the justices by whom he chose to be tried summarily.

They dismissed the charge on the ground that he was incapable, by reason of drunkenness, of forming the intention of depriving the owner permanently of the chattel at the time when he took it, but a case was stated for the opinion of the Divisional Court. The members of the latter (Lord Goddard C.J., Humphreys and Finnemore JJ.) were doubtful whether it can be said 'that a man who is able to mount and ride a bicycle for two hours is yet so incapably drunk that he is unable to apply his mind to the simple question whether he intends to take the machine away for good or to borrow and return it' (at p. 400); but they decided that the respondent should have been convicted of larceny because, even if the taking of the bicycle was not felonious on account of the absence of the essential intention, it was unlawful and became felonious when the essential intention was manifested on the following day. They thus based their decision on the well-known case of *R.* v. *Riley* (1853) Dears. 149, in which the prisoner, who was held guilty of larceny, inadvertently drove one of the prosecutor's lambs out of a field with his own flock, and sold it on becoming aware of its existence for the first time.

It may be observed en passant that *Ruse* v. *Read* serves as a reminder that *lucri faciendi gratia* is not an element of the English definition of theft, but its main interest lies in its affirmation of the doctrine that 'if the original possession be wrongful, though not felonious, and then a man disposes of the chattel animo furandi, that is larceny' (Dears. 158, *per* Pollock C.B.). Some mention

must also be made of the implications of the judgment of the court, read by Humphreys J., on the law as to possession.

(1) *Trespassory possession and subsequent felonious intent.* The decision of the Court for Crown Cases Reserved in *Riley's Case* (*supra*), was treated as binding on the Divisional Court, a point which may be of some interest so far as the doctrine of precedent is concerned, and its application, notwithstanding the absence of any reference to its underlying principle in the Larceny Act, 1916, may be regarded as a triumph of logic and social convenience over history and the grammatical interpretation of a statute. It is unfortunate that the attention of the court does not appear to have been drawn to Mr. J. W. C. Turner's criticisms of *Riley's Case* (*Modern Approach to Criminal Law*, p. 374), and that the judgment contains no reference to the requirement of the Larceny Act, 1916, that the felonious intent must exist *at the time of the taking and carrying away*, but, now that larceny by a bailee is punishable notwithstanding his original lawful possession, it would undoubtedly be illogical and socially undesirable to allow one whose original possession was trespassory to go unpunished if he subsequently converts the chattel in question animo furandi. Nevertheless, as the doctrine of *Riley's Case* (*supra*) is, in the words of Lord Coleridge C.J. (16 Q.B.D. 226), 'extremely technical', it is important to endeavour to appreciate the reasoning upon which it is based with exactitude.

Unfortunately, two views have been expressed on this subject. According to the first, Riley took the prosecutor's lamb on two occasions, firstly as a mere trespasser, and secondly as a thief. This is the interpretation placed on this part of the case by Mr. Turner, and the decision is thus open to the numerous objections stressed by him, including the point that, by a parity of reasoning, every receiver from the actual thief could be convicted of theft as a principal in the first degree on the ground that he was a participant in a joint taking (*op. cit.*, 380–1). According to the second view, Riley's conviction can be supported on the ground that the felonious intent manifested by his sale of the lamb can be related back to the time when he took the prosecutor's lamb by driving it out of the field (Kenny's *Outlines of Criminal Law*, 15th ed., p. 244). The doctrine of trespass ab initio affords an obvious analogy.

Some remarks of Parke B., in *Riley's Case* (*supra*), certainly lend colour to the first view: 'Being a trespasser, the moment he *took* the lamb with felonious intent he became a thief', and he appears to have had in mind the doctrine of continuing trespass and the procedural fiction that a theft committed in one county continues into the next rather than the doctrine of trespass ab initio. However, the judgment of Pollock C.B. only contemplates one taking, and the second view at least has the merit of avoiding

the particular objection to the decision in *Riley's Case* (*supra*), to which reference has already been made.

Moreover, it is more consistent with the view expressed in *Ruse* v. *Read* (at p. 401) that the doctrine under discussion was not a new one in 1853, although, with respect, it may be doubted whether Hale's remark (1 *Pleas of the Crown*, 509), that a subsequent sale by the taker of a horse is 'a declarative of his first taking to be felonious and animus furandi', is anything more than a statement of the means by which a felonious intent may be proved to have existed at the time of the taking. If this is so, the analogy of the doctrine of relation back of the felonious intent with trespass ab initio is historically justified because the latter appears to have originated in the presumption that the original entry must have been effected with wrongful intent (Holdsworth, *History of English Law*, Vol. 7, p. 500). It may also be observed that the second view commended itself to Lord Coleridge C.J. who, in discussing *Riley's Case* (*supra*), said that, 'by the sale, the trespass became felonious', and, he supposed, 'felonious ab initio' (16 Q.B.D. 226).

Nevertheless, even the second view involves a fiction, namely, the pretence that a person had a felonious intent at a time when he did not have it, and the decision in *Ruse* v. *Read* is, to say the least, a bold one, having regard to the requirement of the Larceny Act, 1916, as to the synchronisation of the felonious intent with the taking and carrying away. Several questions might be put as to the precise extent of the doctrine, for example, would it apply to a case in which there was affirmative evidence that the intention of the accused was not felonious at the time of the taking, as would be the case where he intended to return the chattel to its owner? If so the doctrine of estoppel appears to have crept into our criminal law. Perhaps *Riley's Case* (*supra*) is best explained by saying that there was only one taking, but that it continued until the trespass became a conversion, as larceny always involves a denial of the former possessor's right to possess as well as a taking of possession from him. The receiver from the thief cannot, on this view, be prosecuted for theft, because he did not participate in it, as the conversion must have been complete prior to his reception of the chattel. Even this view, however, involves the fiction that the taking of possession is a continuous transaction, which it is not, and is no easier to fit into the scheme of the Act of 1916 than the others.

(2) *Possession*. The upshot of the above discussion is that conduct which most would agree ought to be punished, can only be punished under the present law by the doubtful method of disregarding the clear words of a statute, on account of a doctrine which involves a fiction however it may be explained, and which is based on one reported case prior to the passing of the statute. The moral would appear to be that the definition of larceny which

is based on the common law conception of the offence which has, throughout history, proved wanting in so many respects, should be revised so as expressly to include conduct such as that of the respondent in the instant case. Further support may perhaps be found for this view in the implications of the judgment in *Ruse* v. *Read* so far as the rules as to possession are concerned.

This perplexing problem was not before the court because it was not suggested that the respondent did not gain possession of the bicycle before he disposed of it. We therefore still have to await an authoritative judicial pronouncement on the possible effects of drunkenness on the animus possidendi. The judgment does, however, refer with approval to the decision of the Court of Criminal Appeal in *R.* v. *Hudson* [1943] K.B. 458, in which it was held that the recipient of a letter did not acquire possession of a cheque inside the envelope until he opened it some days after he received it, because he was then, 'for the first time, . . . in a position in which he had not been before :—to form an intent' ([1943] K.B. 462 *per* Charles J.). The absence of any reference in the judgment in *Ruse* v. *Read* to the view of Pollock C.B. that Riley may not have taken possession of the prosecutor's lamb before he knew of its existence (Dears. 158), seems to involve acceptance of the view that Riley took possession of the lamb when he unwittingly drove it from the field. Accordingly, it becomes necessary to consider how it is that Hudson did not get possession of the cheque until he became aware of it, whereas Riley did get possession of the lamb although he was unaware of its presence in the flock which he was driving.

It seems that there are two possible explanations. The first, which receives no direct support from anything said in the judgment in *Hudson's Case* (*supra*), is that it is simply an illustration of the principle which ultimately derives from the *Carrier's Case* ((1473) Y.B. 13 Edw. 4, fo. 9, pasch. pl. 5) that, in the absence of further evidence, possession of a receptacle does not involve possession of its contents. On this view it may perhaps still be regarded as an open question whether someone in the position of Ashwell, who asks another for the loan of a shilling and, unknown to both parties receives a sovereign, gets possession of the latter coin before he becomes aware of its identity (*R.* v. *Ashwell* (1885) 16 Q.B.D. 190).

The second explanation is that Riley must be taken to have assented to possession of the prosecutor's lamb because he performed the positive act of driving it from the field.

This is certainly supported by the prominence given in the judgment of the Court of Criminal Appeal in *Hudson's Case* (*supra*), to the remark of Cave J. (16 Q.B.D. 203), that possession unaccompanied by ownership, being of doubtful benefit because of possible liabilities towards the absolute owner, 'A man cannot be presumed to assent to possession of a chattel; actual consent

must be shown'. Hudson, on the other hand, could not be proved to have assented to possession of the contents of the letter, because his conduct with regard to them was purely passive. On this view, Ashwell did not get possession of the sovereign until he became aware of its identity. It may be added that, on either view, the man who takes another's umbrella by mistake for his own and later decides to keep it, who has not yet progressed from being a subject of examination questions and a hypothesis in judicial argument (*R.* v. *Preston* (1851) 2 Den. 359 *per* Martin B.) to the status of a person charged with larceny in a reported case, would get possession at the time of the physical taking. However, it seems preferable to account for this by the fact that he does a positive act in relation to the chattel as opposed to merely receiving it, rather than by saying that he takes the entire chattel and not merely its container.

The above discussion may seem to be devoid of practical importance on account of the rarity with which the facts involved occur in real life. Nevertheless, so far as the first part of this note is concerned, it is difficult to suppose that there cannot be a number of cases in which it is only possible to convict a person, who manifests the felonious intent somewhat belatedly, of larceny, on the basis that a man must be presumed to have intended what he does afterwards, long before he does it; while, so far as the second part of the note is concerned, it seems ridiculous that the question of theft or no theft should depend on such refined and doubtful distinctions as those which the writer has endeavoured to draw. Surely it is now possible to free the law of larceny from the fetters of its history, by defining it in the terms of the draft criminal code of 1878 as 'The act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent to deprive the owner permanently thereof, or to deprive any person having any special property or interest therein permanently of such property or interest'.

Rupert Cross.

EVIDENCE OF SIMILAR ACTS

Those who had hoped that the trend of the last twenty or thirty years, giving the trial judge greater discretionary powers in dealing with evidence of similar acts and evil propensity, had found, at last, authoritative confirmation in the judgment of Goddard L.C.J. in *R.* v. *Sims* [1946] K.B. 531, have received a rude shock by the decision of the Judicial Committee of the Privy Council in *Noor Mohamed* v. *R.* [1949] 1 All E.R. 365, which seems to throw the whole issue once again in the melting pot. In this case the Judicial Committee allowed an appeal against a conviction for murder on the ground that evidence concerning previous acts of the prisoner had wrongly been admitted. The appellant had been charged with

murder by cyanide poisoning of a woman, Ayesha, who lived with him as his wife. There was no evidence that the prisoner had actually administered the poison, and in order to fill the gap in the evidence the prosecution sought to tender evidence that, two years previously, the accused's first wife, Gooriah, had also died of cyanide poisoning under circumstances which showed that he had persuaded her by a trick to take the poison. After argument in the absence of the jury, the trial court had allowed this evidence to be introduced. On appeal the Judicial Committee came to the view that the evidence referring to the first wife should not have been allowed and that the verdict could not stand.

The actual decision in *Noor* may be defended on the ground that there seems to have been no evidence whatever connecting the prisoner with the death of Ayesha, and that, without the evidence concerning Gooriah, the jury must have found for the prisoner, since not only suicide or accidental poisoning, but even possibly the deliberate act of a third person might have been consistent with the available evidence. But it is to be regretted that, so far as can be seen, two very important earlier cases on very similar facts, namely *R.* v. *Geering*, 18 L.J.M.C. 215 (see also *R.* v. *Flannagan* (15 Cox 403)) and *R.* v. *Armstrong* [1922] 2 K.B. 555, were not brought to the attention of the Committee.

In *R.* v. *Geering* the prisoner was charged with murdering her husband with arsenic and evidence was admitted that subsequently arsenic had been taken by three of her sons. In fact so little doubt was there about the relevance and admissibility of this evidence that counsel for the defence indicated that he would not have argued the point had the sons died before, instead of after the father.

In *R.* v. *Armstrong* on a charge of murder by arsenic, evidence was allowed not only of the fact that more than a year previously the murdered wife had shown signs of arsenic poisoning, but also of an attempt, subsequent to her death, to administer the same poison to another person. Lord Hewart C.J. indicated that the subsequent poisoning had a distinct bearing on the issue before the court because it showed that the defendant had arsenic in his possession and that he would use it to poison a human being.

In *Noor Mohamed* the Judicial Committee put its objection to this evidence in the following form: 'The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and, having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha'. Certainly the same thing might have been said in *Geering* and *Armstrong*, yet there the evidence which the Judicial Committee regarded as irrelevant was considered relevant and admissible. It is certain that, if the jury had come to the view that the prisoner had not

murdered Gooriah, the whole evidence referring to her was clearly irrelevant, a point expressly made in the other two cases. But what if the jury did come to the view, as it seems to have done on the available evidence, that Gooriah had been induced by a trick of the prisoner's to take this poison? Can it really be said that this information did not throw decisive light on the death of Ayesha by the same poison under similar circumstances?

H. A. Hammelmann.

CONTRACTUAL PROMISE—FREEDOM OF EXECUTIVE ACTION

In *Robertson* v. *Minister of Pensions* [1948] 2 All E.R. 767, an attempt is made to delimit the scope of the rule that the Crown cannot by contract fetter its future executive action, but whether it has cut down the doctrine as much as may appear at first sight is perhaps doubtful. The case itself is concerned with a promissory undertaking of the '*High Trees House*' type, but its reasoning is equally applicable, and was applied by Denning J. (as he then was) to strict contracts. Briefly, R., while in the army, suffered an injury and in 1941 by a letter to him the War Office accepted as attributable to military service the disability which followed. In reliance on this letter R. took no further medical opinion at the time. Subsequently a pensions tribunal disagreed, finding the disability attributable to an earlier accident. On appeal Denning J. held the Minister of Pensions bound by the War Office letter of 1941, despite the fact that in 1939 the administration of such disablement claims had been transferred from the War Office to the Ministry of Pensions and that the former had not consulted the latter before writing the letter of 1941.

In reaching this conclusion the learned judge first found that the acceptance of liability fell within the scope of promises intended to be binding and so effective within the limits of *High Trees House*. So to hold was not, however, sufficient since the doctrine of freedom of executive action was invoked by the Crown in claiming freedom to revoke the undertaking of 1941. In dealing with this defence Denning J. held the doctrine, which is apparently unaffected by the Crown Proceedings Act, 1947, only applicable where 'there is an implied term to that effect or that is the true meaning of the contract' (p. 770), and on the terms of the letter in question he found no room for any implication. On this point he distinguished *The Amphitrite* [1921] 3 K.B. 500, on the ground that there there was not a promise intended to be binding but only an expression of intention. The disappointment of the Swedish ship owners there at this interpretation of an explicit undertaking given on the highest authority of the government would be understandable, but similar disappointment may, in effect, await future recipients of governmental assurances unless the limits of the

doctrine, propounded in that case and explained in the present one, are clear.

In the present case Denning J. treats *The Amphitrite* as based on cases involving the right of the Crown to dismiss its servants at pleasure, cases which he said must be read in the light of *Reilly* v. *R.* [1934] A.C. 176. Yet there Lord Atkin appears to have recognised this right of dismissal at pleasure, at least where not expressly excluded, when at p. 180 he emphasises that a discretionary power to terminate a contract does not prevent the existence of a contract until termination. Further, in *Rodwell* v. *Thomas* [1944] 1 K.B. 596, where, however, *Reilly's Case* was not apparently discussed, the right to dismiss at pleasure was recognised to its fullest extent. It seems, therefore, to be maintainable that even if these cases did form the basis of *The Amphitrite* doctrine, and were not only illustrations of another application of it, the basis is still a firm one and the limitations of the doctrine remain important. If the promise comes within Rowlatt J.'s category of 'commercial contracts' there is no discretionary power to revoke, but that category is itself indeterminate, and he gives no criteria by which to distinguish such contracts from those involving the 'welfare of the state' where he admits the power. The present case, while recognising the doctrine, suggests a limitation dependent on construction and implication, which does not, it is submitted, bring much greater precision. Where the promise is unambiguous and no general public policy is involved the doctrine appears to be excluded, as in this case. In major matters, however, it still seems possible that the 'true meaning' of the contract could more readily include this freedom of executive action. Is, for example, an undertaking given by the Minister under s. 20 (2) of the Town and Country Planning Act, 1947, to be regarded as unconditional and binding or is it possibly always subject to changing views or altered conditions of town planning.

Robertson's Case does, however, neatly illustrate the unity of the Crown, since having got thus far it was still necessary for the applicant to bind the Minister of Pensions by the letter of another department. Here there was less difficulty since it is well recognised that each department being only an agent of the Crown is bound through the Crown by the acts of other agents (see also *The Steaua Romana* [1944] P. at p. 51). It is noticeable that here the limitation of the authority of the War Office was not one of departmental arrangement but of general law under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, yet still the subject was entitled to rely on the department having the authority which it assumes, which may be of some consolation to those bemused by departmental intricacies.

J. D. B. Mitchell.

NEGLIGENCE—'LEGAL' AND 'SOCIAL' DUTY

SOME interesting points arose in the recent case of *Longhurst* v. *Metropolitan Water Board* [1948] 2 All E.R. 834. In the absence of negligence on the part of anyone a leak occurred in a stop-cock installed by the respondents as statutory undertakers under the Waterworks Clauses Act, 1847. As a result of the leak water percolated beneath the public pavement and caused certain paving stones to wear loose so that they became a danger to pedestrians. In mending the leak the respondents' workmen, under powers conferred by the Act, took up and replaced some paving stones around the stop-cock and subsequently gave notice to the D. Corporation, the highway authority, to reinstate them. Before reinstatement had been effected the appellant caught her foot on a stone outside the area of the respondents' operations, which had been affected by the leak. She thereby suffered injury. Some days previously the appellant had warned the corporation authorities that the pavement generally in that area was in a dangerous condition.

On these facts, in an action for negligence by the appellant against the respondents, Humphreys J. found that the defective condition of the stone which caused the injury was such that the respondents, through their servants, should have become aware of it when they were mending the stop-cock. He therefore held that the respondents ought to have seen that 'immediate notice (of the dangerous state of affairs) was given to the corporation, and meanwhile to (have kept) a man at the place to warn people off this particular dangerous stretch of pavement until the corporation arrived' ((1947) 176 L.T. 345 : p. 356). Since the respondents had done neither of these things he gave judgment for the appellant. The majority in the Court of Appeal (Evershed and Somervell L.JJ. : Tucker L.J. dissenting) took a different view of the evidence, finding that the respondents' servants had no means of knowledge of the dangerous condition of the particular stone concerned ((1947) 177 L.T. 483). The court also held unanimously that the corporation had assumed responsibility for the defective pavement (other than that actually removed and replaced by the respondents) because they had been warned about it by the appellant and one of their agents had been on the spot while the respondents conducted their repairs. The decision of Humphreys J. was accordingly reversed. The House of Lords ((1948) 64 T.L.R. 579; [1948] 2 All E.R. 834) unanimously upheld the Court of Appeal on the ground that the respondents had no knowledge or means of knowledge of the danger.

Thus the decision turned upon the proposition that where risk of injury cannot reasonably be foreseen there is no liability in negligence, and there is nothing striking in this. The following points, however, arose in the course of the case. First, since the respondents were held not to have been responsible for the leakage

of the stop-cock and to have had no means of knowledge of the percolation of the water to the defective stone, they could not be held responsible in nuisance. It appears to be settled law that one who himself starts a nuisance is responsible for harm resulting from it in the absence of 'fault'; but it is also settled law that where something is done under statutory authority, and a nuisance is thereby created, there will be no liability in the absence of negligence (see *per* Evershed L.J. (1947) 177 L.T., p. 485; citing Lord Blackburn in *Geddis* v. *Bann Reservoir* (1878) 3 App.Cas. 430, p. 435). In the second place, although both in the Court of Appeal and in the House of Lords it was suggested that responsibility for the accident might have been cast upon the corporation, the effect of doing this would have been to deprive the appellant of any right at all, since the corporation being a highway authority was 'irresponsible', having committed no 'misfeasance'. The injustice of this insupportable immunity received further illustration in the recent case of *Wilson* v. *Kingston-upon-Thames Corporation* [1948] 2 All E.R. 780,[1] where it was held (no doubt correctly) that if a highway authority causes a hole in a road to be filled in so carelessly that all trace of the efforts at repair rapidly disappear, it will be immune from liability to persons injured as the result of the defective condition of the road (see 12 M.L.R. 96). Presumably it would have been otherwise if some trace of the careless operations, even so much as a stone or two, had remained to tell the tale of misfeasance at the time of the accident.

Finally, in the course of argument, counsel for the respondents made a wide submission which did not call for decision, but which seems worthy of comment. Assuming, he argued, that the respondents knew of the danger, and even assuming that there had been no intervening negligence on the part of the corporation, the respondents would still have been immune from liability; though they might have a social or moral duty to warn the public, they would have no legal duty. (See *per* Lord Porter [1948] 2 All E.R. p. 838.) This proposition may on the facts mooted be sound in itself: it may be that in such a case it would be reasonable that the defendant should escape liability—the border-line between success or failure in actions for negligence is always hard to predict because facts play a far greater part in determining the decision than law. It is, however, submitted that even at this late stage it may not be out of place to attack this method of posing the problem. It is the method which assumes that in an action for negligence the plaintiff must bring himself within a special 'duty relationship' before he is entitled to succeed. It is an attitude which has certainly received the sanction of the House of Lords at least once, in *Brackenborough* v. *Spalding U.D.C.* [1942] A.C. 310; but in view of the clear differences of opinion as to the nature of

[1] Affirmed on appeal, [1949] 1 All E. R. 679.

liability in negligence made apparent in *Woods* v. *Duncan* [1946] A.C. 401, it may not even now be too late to reconsider its desirability.

This is not the place to rush in among the angels and restate the arguments for and against the Duty of Care (the question has in any case been ably treated in two recent articles. See W. L. Morison in 11 M.L.R. 9 and Professor F. H. Lawson in 22 Tulane L.R. 111). Perhaps it may, however, be reiterated here that, in *Donoghue* v. *Stevenson* [1932] A.C. 562, Lord Atkin did a great service by attempting to free the law of 'particularism', at long last propounding a general definition of negligence. He defined it in terms of 'duty' simply because a wrong of *omission* cannot be defined in any other way. It is believed that the current tendency to insist upon a 'duty', over and above the duty contained in the maxim '*alterum non lædas*' itself, arises from an inarticulate assumption that because there must always be 'rights of irresponsibility' outside the ambit of the action, it therefore follows that the burden must lie on the plaintiff to establish a 'duty relationship' before he can succeed. It is suggested that this conclusion does not follow from the premise; that the plaintiff should be entitled to establish his case by proof of injury negligently caused, and that it should lie with the defendant to excuse himself by establishing his own claim to immunity. If it be thought that the extent of the plaintiff's reach would thus be stretched too far, it should always be remembered that the concept of negligence 'imports' in itself' a duty of care, and that the pregnant contents of that duty, 'injury', 'causation' and 'neighbour', always remain to be defined. It is submitted that the current tendency to insist upon a precedent 'duty' will have the effect of 'atomising' negligence into a series of primative 'nominate' torts, dependent upon specific relationships, and will thus destroy one of the maturest inventions of the common law.

Philip S. James.

BREACH OF STATUTORY DUTY—FACTORIES ACT CASES

In two recent cases the courts have considered the exact nature of the duties created by the Factories Act, 1937, with reference to lifts, and a third case concerns the effect of delegation of a statutory duty and also the common law liability of an employer.

In *Galashiels Gas Co., Ltd.* v. *O'Donnell* (*or Millar*) [1949] 1 All E.R. 319, the House of Lords have emphatically re-asserted the absolute nature of the employer's duty as created by certain sections of the Factories Acts, and although, as Lord Normand pointed out, 'no new principle and no extension of any principle already recognised is involved', the case will no doubt be cited in future, along with such cases as *Davies* v. *Owen* [1919] 2 K.B. 39, to illustrate absolute statutory duties.

The facts and decision were briefly that the plaintiff's husband was killed in a lift accident owing to a failure of the brakes to operate. The plaintiff's claim for breach of statutory duty was upheld by the Scottish courts, and the defendant Gas Company now appealed to the House of Lords. Their Lordships held unanimously that the appellants were in breach of an absolute statutory duty to see that the lift was properly maintained, and that as there was no contributory negligence on the part of the deceased, this breach of duty caused the accident. They therefore dismissed the appeal.

The issue turned upon the meaning to be attached to section 22 (1) of the Factories Act, 1937, which says that

> ' Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained '.

Section 152 (1) of the Act provides a definition of the word ' maintained ' as meaning ' maintained in an efficient state, in efficient working order, and in good repair '. There appear to have been no previous cases on the construction of section 22 (1), although other sections of the Act have often been litigated, in particular, section 14 (1) concerning the duty to fence dangerous machinery.

The House held that the wording of the subsection was imperative. Lord MacDermott said that ' the nature of the obligation is clear. It . . . falls into a category long recognised and firmly established by authority; it is a strict or absolute duty and neither intention nor lack of care need be shown in order to prove a breach of it '. It was not necessary for the plaintiff to show what more the employers could have done to avoid the accident, and this was so even though ' the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain '. Their Lordships were not convinced by the argument that the presence of the word ' properly ' in section 22 (1) indicated that something less than an absolute standard had been introduced and that the employer's obligation was limited. Lord Reid dismissed this contention as impossible, and suggested that the word ' properly ' was merely inserted to round off the sentence. Furthermore, the House did not accede to the argument that the statute did not make the employers insurers, an argument which was supported by quoting from Lord Atkin's speech in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* [1940] A.C. 152, at p. 164. They explained this statement as applicable only in its context, and as meaning that the person injured must show not only a breach of duty, but that the damage suffered was due to the breach, and not, for example, due to the fault of the workman himself.

Whitehead v. *James Stott, Ltd.* [1949] 1 All E.R. 245, is another case concerning a lift accident and the interpretation of section 22 (1). This time the question was not whether the lift

had been 'properly maintained', but whether it was of 'sound material'. The accident was caused by a defect in the lift shafting, which, though latent on ordinary inspection, could have been detected by modern methods. The Court of Appeal held unanimously that the requirement of the section was an absolute one of soundness. In the course of his judgment, Lord Greene M.R. made it clear that no special form of words was necessary to create an absolute obligation, for Salter J. in *Davies* v. *Owen*, *supra*, did not rely on any special language, and all the other cases where the duty had been held absolute rested on the plain meaning of the wording of the different sections. Furthermore, Lord Greene could see no justification 'for introducing a gloss on perfectly plain English words' to the effect that the test was not soundness but the appearance of soundness. Such a gloss would, in Lord Greene's opinion, 'be quite inconsistent with the general objects of the Factories Acts as explained in a great number of cases'.

No doubt the imposition of absolute obligations on the employer is consistent with 'the general objects of the Factories Acts', as Lord Greene remarks, but if this imposition remained absolute in every case, certain dangerous trades could never be carried on, and certain dangerous machinery could never be used. To avoid this difficulty many regulations have been made under the authority of the Acts 'to meet the necessity of the case'. One such set of regulations concerns the generation, transformation, distribution and use of electricity, and *Barcock* v. *Brighton Corporation* [1949] 1 All E.R. 251, is a case concerning a breach of these regulations.

The plaintiff, who had been appointed by the defendants as an 'authorised person' entitled to carry out tests at sub-stations without supervision, was injured while carrying out such a test after having removed a safety device contrary to the regulations. He based his claim for damages on two grounds: (1) Breach of statutory duty by the employers. Hilbery J. formulated the question to be considered thus: 'where an experienced man is supposed to have had expressly delegated to him the statutory duty which it is incumbent on the employer to perform and he sustains an accident by reason of his not performing the duty', can he claim damages from his employer? The learned judge thought that *Smith* v. *Baveystock & Co., Ltd.* [1945] 1 All E.R. 531, would probably apply so as to prevent the workman from recovering in such circumstances, but he did not find it necessary to base his decision on this ground. (2) Breach of common law duty by the employers in failing to provide a safe system of work. Hilbery J. held that the employers had not discharged this duty, and negatived contributory negligence by the workman, so that the plaintiff's claim succeeded on this ground.

E. Hall Williams.

C.I.F. CONTRACTS

Abbreviations are useful things; indeed, the world of commerce and the civil and armed services seem to find it impossible to get on without them, but they undoubtedly cause difficulties where they have different meanings in different applications. This is particularly true of the expression *c.i.f.* It may mean no more than that the seller is bound to arrange shipment to the named port and to pay the cost, insurance and freight of so doing and that the contract price is fixed accordingly. But the custom of merchants recognised by the courts has given it a much more extended meaning as applying to the contract as a whole, so that where the shorthand expression is used the contract may be a *c.i.f. contract*, which has been loosely described a contract for the sale not of goods but of documents representing the goods, and more accurately defined as a contract for the sale of goods to be performed by the delivery of documents. In such circumstances the seller performs his obligations when he delivers to the buyer an invoice, policy of insurance and clean bill of lading covering only the goods sold. Hence the contract is not frustrated if the goods do not actually arrive and the buyer cannot claim that there has been a failure of consideration; his only remedies (if any) are against the carrier or the insurers.

Unhappily the fact that the contract contains a c.i.f. term is not a decisive indication that the contract is a c.i.f. contract as above defined. Under modern commercial conditions it is perhaps more usual than not to vary the normal obligations to a greater or lesser extent so that the practitioner is more likely to meet a hybrid rather than a pure c.i.f. contract. This is particularly so where the goods are shipped in bulk and remain unascertained until the arrival of the ship, for in such circumstances the shipping documents cannot cover only the goods sold. Hence the modern practice of substituting delivery orders and insurance certificates for bills of lading and policies. The difficulty then is to decide whether the contract is still essentially a c.i.f. one in which the documents take the place of the goods or in reality an ' arrived ' or ex ship contract.

These difficulties of construction are illustrated in an acute form in the important case of *Comptoir d'Achat* v. *Luis de Ridder* [1949] 1 All E.R. 269 (H.L.). The facts were complicated and difficult of accurate summary. Briefly, the contract was for the sale of rye c.i.f. Antwerp and payment was to be in exchange for documents, but the sellers were given the now usual option of tendering delivery orders instead of bills of lading and certificates of insurance instead of policies. The long-standing practice of the parties was for grain to be shipped in bulk and for payment to be made by the buyers on receiving a delivery order addressed to the cargo agents of the sellers by other agents of the sellers. This delivery order

contained an endorsed statement that the bearer had been given a share in a certificate of insurance covering the bulk quantity of rye and an undertaking by the sellers' agents to honour the delivery order according to the terms of the bill of lading. This practice was followed in the case of the present shipment, but owing to the German invasion of Belgium, the sellers diverted the ship to Lisbon and there sold the rye. They were, therefore, left with the original purchase price and the price obtained on the re-sale at Lisbon and the unfortunate buyers were left only with a delivery order which, whatever else it might have done, would certainly not enable them to obtain the goods. It is difficult to see how the buyers could possibly have sustained any action against the carriers or the insurers (the normal remedy of the c.i.f. buyer when the goods fail to arrive) and accordingly they commenced arbitration proceedings to recover the price on the ground that it had been paid for a consideration that had wholly failed.

The basic problem, therefore, was to decide whether the contract was essentially a c.i.f. contract with the delivery order substituted by agreement for the normal shipping documents so that the seller performed his part by handing it over and the goods themselves were at the buyers' risk. The umpire thought it was, but stated a special case. Morris J. upheld his decision ([1947] 1 All E.R. 115) and so did the Court of Appeal by a majority ([1947] 2 All E.R. 443), but the House of Lords unanimously overruled this decision.

The buyers' argument was based on the fact that they had obtained neither property in nor possession of the goods. This was conceded by the sellers; property clearly had not passed since the goods were throughout unascertained goods which had never been appropriated to the contract (S. of G. Act, s. 16), and as regards possession, despite the prima facie rule that possession passes on delivery to a carrier (s. 32), it seems that in the case of a c.i.f. contract possession only passes with the delivery of the documents of title [1] and, whatever this delivery order may have been, it certainly was not a document of title. Nevertheless, the sellers argued, (i) that the contract was essentially a c.i.f. one satisfied by the delivery of documents and that the practice of the parties was that the delivery order should be accepted in lieu of the usual documents; (ii) that the delivery order was of commercial value so that there had not been a total failure of consideration, and (iii) that even if property and possession had not passed risk had. These arguments prevailed in the lower courts but were rejected by the House of Lords.

In support of the sellers' first argument they naturally relied

[1] Schmitthoff: *The Export Trade*, p. 21, states that delivery is complete when the goods are shipped but this seems contrary to the authorities. See *Biddell Bros.* v. *E. Clemens Horst* [1911] 1 K.B. 934; [1911] A.C. 18, and cf. Kennedy *C.I.F. Contracts*, p. 17 *et seq.*).

strongly on the use of the term " c.i.f." and on the fact that payment was to be made ' in exchange for ' documents. But the Lords held that despite these terms it was impossible in the circumstances to regard this as a c.i.f. contract which could be fully performed by the sellers by handing over a delivery order in the present form. In connection with both this argument and argument (ii), much turned on the true effect of the delivery order and it was pointed out that in this case it had not been attorned to in any way by the carrier and that it gave the buyers no right to obtain the goods from the carrier. Before the latter would hand over a portion of the bulk to the buyers the master had to issue a *laissez suivre* so that at the most the delivery order amounted only to a preliminary step towards performance. There was no evidence that it had any commercial value since it was merely an instruction by one agent of the seller to another which conferred no right to possession of the goods, nor did the endorsement confer any additional rights on the buyers since the agents incurred no personal liability by virtue of it. In the light of these considerations it was unlikely that the parties would have agreed to make the payment for the delivery order, and although this was not impossible the House considered that on the true construction of the contract and the surrounding circumstances, the intention was that the presentation of the delivery order merely fixed the time for advance payment for a contract to be afterwards performed by the delivery of the goods.

Even if the delivery order had any commercial value, once it was conceded that the contract was to deliver goods and not documents the sellers' second argument fell to the ground because in connection with the law of failure of consideration it is genarally not the promise which is referred to as the consideration but the performance of the promise (*Fibrosa* v. *Fairburn*, *Lawson* [1943] A.C. 48), and ' the receipt by the promisee of something which the promisor did not promise will not prevent a total failure of consideration ' (*per* Lord Porter at p. 279).

This left only the final argument that the risk had passed to the buyers. It is generally stated that in the case of c.i.f. contracts the risk and the property are separated contrary to the normal rule expressed in S. of G. Act, s. 20, and that risk passes on shipment. On the other hand it is sometimes said that as from the time of delivery of the documents the goods are at the buyer's risk as from the time of shipment (a species of relation back).[2] Be that as it may, it has been held that the seller has a right to tender, and the buyer a duty to accept and pay in exchange for, the documents notwithstanding that it is known that the goods have already perished (*Mambre Saccharine Co.* v. *Corn Products Co.*

[2] See *Biddell Bros.* v. *E. Clemens Horst*, *supra*, and the discussion in *Kennedy op. cit.*, p. 138 *et seq.*

[1919] 1 K.B. 198 and cf. *Groom, Ltd.* v. *Barber* [1915] 1 K.B. 316). Once the House had decided that this was not a c.i.f. contract the force of the sellers' argument under this head was destroyed, but dicta of Lord Porter (at p. 276) appear to cast doubt on whether it is ever possible for the risk to pass to the buyer while both property and possession remain in the seller. He seemed to think that this would only be possible where a bailee had attorned to the seller (and then possession would surely have passed by constructive delivery?). On this subject the observations of Lord Normand (at p. 280) are of particular interest. He conceded that the parties could agree to some purely artificial allocation of the risk and that if they expressed that agreement in suitable words effect would somehow have to be given to it. But parties to commercial contracts were practical men and he suggested, as did Lord Porter, that in those cases (such as *Inglis* v. *Stock* (1895) 10 A.C. 263 and *Sterns* v. *Vickers* [1923] 1 K.B. 78) in which it had been held that risk had passed even although property had not, it was because the buyer had an immediate right to the goods under a storekeeper's warrant or because he was entitled to the whole of the bulk under several contracts. He also pointed out that the agreement of the parties that the buyer should bear the risk of a loss against which the insurance was provided for by the contract was no evidence that the buyer was also to bear other risks. This suggests that even in a pure c.i.f. contract and despite the *Mambre Saccharine Case* (*supra*) the buyer would be entitled to refuse to take up shipping documents if the goods had then perished, owing to a risk not insured against by the usual policy.[3]

It is thought that the effect of the decision may be summed up as follows :—

1. A pure c.i.f. contract is one in which the seller performs his obligations by tendering a clean bill of lading, an invoice and a marine insurance policy covering only the goods sold and in which the buyer is bound to accept them and pay irrespective of what happens to the goods themselves.

2. The parties may expressly agree to substitute other documents (*e.g.*, a delivery order and insurance certificate) for the bill of lading and insurance policy.

3. Where they do so it is a question of construction in each case whether the other normal obligations of a c.i.f. contract remain unaffected so that 'the documents take the place of the goods'. The use of the expression *c.i.f.* is far from decisive, it

[3] This is to some extent supported by the *Mambre Saccharine Case* itself, which was expressly based on the principle that 'the contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract' (*per* McCardie J. at p. 204). It is arguable that only insured risks are so contemplated.

may merely indicate that the seller is to arrange shipment and insurance and be paid accordingly.

4. The courts will be very reluctant to construe these hybrid c.i.f. contracts as providing that the documents take the place of the goods unless the substituted documents are such as to give the buyers an immediate and enforceable right to obtain the goods (*e.g.*, a delivery order attorned to by the master) and rights which can be made effective against the insurer in the event of loss. In other cases they will strive to construe the contract as one in which the seller is obliged to deliver the goods themselves at the named port of destination and in which the risk remains with him until he does so.

L. C. B. Gower.

LANDLORD'S REFUSAL OF CONSENT TO ASSIGNMENT WHERE STATUTORY TENANCY MAY ARISE

The judgments in *Houlder Brothers & Co. Ltd.* v. *Gibbs* [1925] Ch. 198, 595, show that a landlord's refusal to give consent to an assignment by his tenant 'must be connected with the person or personality of the proposed assignee and must directly affect the subject-matter of the contract'. There are passages in the judgment of Pollock M.R. which indicate that the court has a very wide latitude when deciding whether a withholding of consent is reasonable or unreasonable. Thus he says (at p. 594) :—

> 'I think it is impossible to give an exact definition which will cover all cases.'

There was, therefore, sufficient scope for the decisions of the Court of Appeal in *Lee* v. *K. Carter, Ltd.* [1948] 2 All E.R. 690, and *Swanson* v. *Forton* [1949] 1 All E.R. 135 that the matters which can be considered by the Court are not confined to those which may arise during the lease, and may include possibilities which will arise only when the lease is at an end.

In both cases the tenant wished to make an assignment, shortly before the expiration of the contractual tenancy, of a lease of a dwelling-house which fell within the Rent Restrictions Acts. If the landlord had consented to the assignment, the assignee at the end of the contractual tenancy would have become a statutory tenant. The landlord's refusal of consent was therefore held to be reasonable.

In an earlier case, *Re Swanson's Agreement* [1946] 2 All E.R. 628, the assignment was made by a tenant in occupation of the premises. Evershed J., assuming that the contractual tenancy had not terminated, held that a refusal of consent to the assignment was unreasonable. However, he found on the facts that the contractual tenancy had come to an end, so that the tenant held a statutory tenancy which he could not assign. In his judgment

he had confined reasonable refusal to matters relating to the manner in which the premises are used or occupied. In both the later cases that limited view was disapproved and in *Swanson* v. *Forton*, Eversheed L.J. admitted that he had gone further than was justified by the judgment of Tomlin J. in *Houlder Brothers & Co. Ltd.* v. *Gibbs*.

In *Swanson* v. *Forton* the assigning tenant was not in occupation. The purpose of an assignment twelve days before the end of the term could only have been to enable the assignee to become a statutory tenant on the termination of the contractual tenancy, especially having regard to the fact that the assignee had paid rent in advance for the residue of the existing term. As Eversheed L.J. said, 'the assignment . . . was intended to relate, in its effect, not really at all to the contractual term, but only to the period after the end of the term'. If the tenant had remained in occupation until the end of the contractual tenancy, he would have become a statutory tenant and could not then have assigned his tenancy. In effect the assignment was an attempt to assign the statutory tenancy before it came into existence, although of course in fact only the contractual tenancy was assigned. There was something analogous to an abuse of right; but it can only be an analogy because—

1. the right to assign must depend on whether the refusal of the landlord was reasonable;
2. until the contractual tenancy has come to an end, it cannot be said that the tenant has a right to a statutory tenancy. At the most, he has an expectation, though an expectation which may be very strong if the last moment for giving a notice to determine the contractual tenancy has expired.

Indeed, if we were to adopt the view that in any circumstances the tenant has a right to a statutory tenancy before the determination of the statutory tenancy, in theory he could pass that right to an assignee shortly before the end of the term and so evade the rule that a statutory tenancy cannot be assigned. However, such a conclusion must still depend on the broader question whether the landlord can refuse his consent to such an assignment.

In *Lee* v. *K. Carter, Ltd.* the tenant was a limited company and the proposed assignee was a director who under the terms of the lease had been allowed to reside on the premises. A limited company cannot become a statutory tenant. In *Swanson* v. *Forton*, Lord Greene M.R. thought that there was no difference between the two cases because in the circumstances of the later case the tenant, not being in occupation, also could not become a statutory tenant. It was immaterial that in the former case the reason for the impossibility of a statutory tenancy was a matter of law whereas in the latter case it was a matter of fact.

However, in *Gibbs' Case*, Warrington L.J. (at p. 585) said :—

'Now what is to be inferred from what may be treated as

having been in the contemplation of the parties when the contract was made?'

That seems to suggest that the reasonableness of a landlord's refusal must relate to matters which can reasonably be regarded as having been in the contemplation of the parties at the time when the contract between landlord and tenant is made.

In *Lee's Case*, Tucker L.J. bases his decision to some extent upon this criterion. He says (at p. 692):—

> 'It is clear from the provisions of the lease that it was expressly designed to ensure for the landlord that, at the expiration of the lease, he should have as tenant, if he was so minded, a limited liability company which would not be able to claim the protection of the Rent Restrictions Acts in answer to any proceedings he might desire to take to obtain possession of the premises'.

Clearly, therefore, the possibility—or rather the impossibility—of a statutory tenancy could be said to have been in the contemplation of the parties when the lease was granted. That criterion was not referred to in the judgments in *Swanson* v. *Forton*, but it can reasonably be supposed on the facts that the parties did contemplate the possibility of a statutory tenancy, particularly since the landlord had let a number of houses and had a long waiting list of prospective tenants to whom she wanted to be fair.

How far does *Swanson* v. *Forton* go? Lord Greene M.R. made it clear that nothing he had said was to be taken as applying to a 'normal assignment', and that the assignment before the court was abnormal. It may be submitted that an assignment is normal as long as it can be effected before the last date on which the landlord can give notice to determine the contractual tenancy. Until that time, or perhaps until a reasonable time before that time, it is possible that the court could hold that a refusal to consent to an assignment is, *ceteris paribus*, unreasonable. However, where there is no provision for determination by notice and the lease determines by effluxion of time only, there must be throughout the lease the possibility of the 'delayed action' effect of an assignment and the assignee could become a statutory tenant at the expiration of the contractual tenancy. As far as we can gather from the reported facts, *Swanson* v. *Forton* was a case of this kind. It is not easy, therefore, to discover what assignment can be normal in such a case. No doubt the circumstances of *Swanson* v. *Forton* showed clearly that the assignment was nothing more than a specious device to anticipate the consummation of a statutory tenancy. But if the tenant had remained in occupation and had made the assignment early in the period of the lease, how would the court have dealt with the assignment of what Tucker L.J. in *Lee's Case* referred to as a 'contractual relationship pregnant with future possibilities, or more than possibilities'? The landlord may

still have had reasonable fears of the possibility that a statutory tenancy would be created.

RAPHAEL POWELL.

TORTS IN THE CONFLICT OF LAWS

'As a general rule', said Willes J. in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 at pp. 28–29, 'in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done'. This is, of course, the classic formulation of the English conflict of laws rule for tort liability. It has often been criticised. Referring to the first part of the rule, Professor Lorenzen says 'the illiberal attitude manifested by the English courts does not obtain elsewhere except in China and Japan' (*Selected Articles on the Conflict of Laws*, p. 376); and Professor Hancock says 'one would look far to find a more striking example of "mechanical jurisprudence", blind adherence to a verbal formula without regard to policies or consequences' (*Torts in the Conflict of Laws*, p. 89). It will be observed first, that Willes J. referred to the possibility of exceptions to his general rule; secondly, that in the first part of his formula the learned judge says the *wrong* must be *actionable* in England, whereas in the second part he says the *act* must not have been *justifiable* by the law of the place where it was done.

A recent case in the Court of Session clearly indicates the harmful results which follow from applying too rigidly a mid-Victorian verbal formula without regard to the possibility that it may require amendment in modern conditions. In *McElroy* v. *McAllister*, 1949 S.C., the pursuer's husband, who was resident in Glasgow, was killed on an English road in Westmorland by the alleged negligence of the defender, who was also resident in Glasgow. At the time of the accident the pursuer's husband was a passenger in a vehicle belonging to his employers, a Glasgow company. The vehicle was being driven southwards by the defender when it collided with a twelve-ton sheep truck. The pursuer claimed £2,000 damages in her individual capacity and £2,000 damages in her capacity as executrix-dative of her husband. If the accident had happened in Scotland, the pursuer would have been entitled to damages in respect of solatium and patrimonial loss and funeral expenses in accordance with Scots law. If the action had been brought in England, she would have been entitled to compensation for pecuniary loss in her capacity as a dependant under the Fatal Accidents Acts, 1846–1908, and also to damages for the deceased's loss of expectation of life and funeral expenses under the Law Reform (Miscellaneous Provisions) Act, 1934. (Neither of these statutes applies

to Scotland.) It was held, however, by the Lord Ordinary and a majority of the Inner House that apart from a sum of £40 in respect of funeral expenses, which was conceded, the pursuer could not recover under either head of her claim.

At least two judges in the majority held that the pursuer's other claims failed because they had not been properly pleaded, but the substantive grounds on which all the majority judges were agreed were as follows: (a) The claim for solatium failed because it had been held in *Naftalin* v. *L. M. S. R.*, 1933 S.C. 259 that such a claim was a substantive and independent right of action and not a mere item in a claim for damages, and was thus a matter for the *lex loci delicti* and not for the *lex fori*; and since English law, the *lex loci delicti*, does not recognise a claim for solatium for negligently caused death, the claim must fail. 'The principle which I am content to extract from *Naftalin* and to re-affirm', said the Lord President 'is the negative one that the Scottish courts will not recognise in a pursuer any specific *jus actionis* which is denied to him by the *lex loci delicti*.' In other words, when considering whether the act or omission complained of is actionable by the *lex loci delicti*, the Scottish courts will not limit the inquiry to the question whether the act or omission is actionable in the abstract, but will extend it to the further question—on whom does the *lex loci delicti* confer a *jus actionis*, and for what?' All seven judges agreed that *Naftalin* v. *L. M. S. R.* was rightly decided and that the earlier decision in *Horn* v. *North British Ry.*, 1878, 5 R. 1055 must be regarded as overruled. The implications of this view are no doubt that in Scotland 'not justifiable' means something much more like 'actionable' than it does in England; and that the case of *Machado* v. *Fontes* [1897] 2 Q.B. 231, where an extended meaning was given to 'not justifiable', would not be followed.

(b) The pursuer's claim under the Fatal Accidents Acts failed because the action was begun more than twelve months after the accident, contrary to section 3 of the Act of 1846. The majority judges followed the decision of Lord Shand in *Goodman* v. *L. N. W. R.*, 1877, 14 S.L.R. 449, approved in subsequent cases. Lord Russell justified the rejection of this part of the pursuer's claim as follows: 'If the pursuer is correct in asserting that the statutory time limit attached to her right of action by the *lex loci delicti* is to be disregarded, it follows that we are being asked not merely to allow the pursuer to come before us depending on foreign law for the foundation of her case, but also to deny to the defender the benefit of the limitation on his liability which that law would itself impose'.

(c) The pursuer's claim for damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934, failed because the effect of that Act in English law is to preserve for the benefit of a deceased person's estate a cause of action vested in him before his death, whereas it had been held by the House of

Lords in *Stewart* v. *L. M. S. R.*, 1943 S.C. (H.L.) 19 that by Scots law all right of action in respect of personal injuries due to negligence dies with the injured person, unless he had instituted legal proceedings before his death. In other words, the Scottish actio injuriarum, like its Roman counterpart, is not actively transmissible, and therefore the pursuer could not show that the defender's wrong was actionable by the *lex fori* as she was required to do by the first rule in *Phillips* v. *Eyre*.

In an interesting dissenting judgment, Lord Keith, while agreeing that the claim for solatium failed, would have allowed the pursuer to recover under the other two heads. As regards the claim under the Fatal Accidents Acts, Lord Keith considered that the crucial time at which it must be shown that the act is not justifiable by the *lex loci delicti* is the time when the act is done and not the time when the action is brought: and therefore the pursuer could bring her case literally within the framework of Willes J.'s formula, since the act was clearly not justifiable by English law at the time when it was done. 'The *lex fori*', he said, 'looks to the juridical nature of the act done according to the *lex loci* and not to limitations that may be placed on the right of action by the *lex loci*'. At first sight this attractive argument seems to run counter to *Phillips* v. *Eyre* itself, for in that case the defendant's act was admittedly tortious when it was done, but was subsequently justified by an act of indemnity. But Lord Keith points out that there is a great difference between a statute of limitation, which does not alter the juridical nature of the act, and an act of indemnity, which has retroactive effect and renders justifiable what was previously unjustifiable. He demonstrated that the decided cases relied on by the majority were not very convincing, for in *Goodman* v. *L. N. W. R.* (where the precise point was decided) the defenders settled for a substantial payment, and in the later cases where this case was approved a different point was in issue and the approval was therefore obiter.

With regard to the pursuer's claim under the Law Reform (Miscellaneous Provisions) Act, 1934, Lord Keith pointed out that the first rule in *Phillips* v. *Eyre* has often been criticised, that apart from dicta it rests on the authority of a single case (*The Halley* (1868) L.R. 2 P.C. 193), and that Willes J.'s dictum imposes a stricter test than that case really warrants. For in *The Halley* no wrong had been committed at all by the defendants according to English law (the *lex fori*), whereas Willes J. seems to assume a wrong and then requires that it be *of such a character* that it would have been actionable if committed in England. Hence there was no reason why the Scottish court should feel obliged to follow English authority.

It seems a pity that the Court of Session, in spite of its well-known predilection for principle rather than precedent (the phrase is Lord MacMillan's in *Stewart* v. *L. M. S. R.*), was only able to

award the pursuer the modest sum of £40, although she would have been able to recover much more substantial damages if the action had been brought in England, or if the accident had happened in Scotland. It is difficult to disagree with Lord Keith's conclusion that 'the present case is a typical case where insistence on the double rule enunciated by Willes J. may work injustice'. On the other hand, the Lord President did not consider that any hardship was being inflicted on the pursuer, for 'if a person suffers a wrong in a foreign country, the primary court from which to seek redress is the court of that country, which will presumably provide the remedy which the *lex loci delicti* affords and knows how to do so'. But, with respect, this dictum appears to confuse jurisdiction with choice of law. The conflict of laws assumes that it may not always be possible or convenient to sue in the country of wrong, either because the defender cannot be served with a writ in that country or because he has no assets there with which to satisfy a judgment. If a pursuer is always obliged to sue in the country of wrong, we might as well have no choice of law rules for tort liability at all. In the present case, to be sure, the English High Court could have ordered the writ to be served on the defendant in Scotland under Order 11, r. 1 (*ee*) of the Rules of the Supreme Court, because the tort was committed in England, and the plaintiff could have enforced the judgment in Scotland by registration under the Judgments Extension Act, 1868. But the exercise of the jurisdiction under Order 11 is highly discretionary, and the English court might well have taken the view that a trial in Edinburgh would have been more convenient than a trial in London or Appleby, in which case the plaintiff's application for leave to serve the writ in Scotland would have failed (Order 11, r. 2). After all, both parties were resident in Scotland: why should the pursuer not be allowed to sue in the court of her own country and with the help of her familiar legal advisers?

We may perhaps go further still and advance the heretical suggestion that a decision in the pursuer's favour could have been arrived at by a more direct process of reasoning. For if a Scots motorist negligently injures a Scots pedestrian or passenger on an English road, is there any valid reason why a Scots court should not apply Scots law to the decision of the case? No doubt an English court is bound by authority to hold that if a Scots motorist negligently injures a Scots pedestrian on an English road, the case is governed by English law: *Szalatray-Stacho* v. *Fink* [1947] K.B. 1, a case of libel. But this decision does not (it is submitted) prevent an English court from applying English law to a tort committed in Scotland by one Englishman against another. Still less does it prevent a Scots court from applying Scots law to a tort committed in England by one Scotsman against another. On the contrary, there is some authority that this is a perfectly natural and proper thing to do. For in the case of *McLarty* v. *Steele*,

1881, 8 R. 435, it was held that where one Scotsman uttered a verbal slander against another Scotsman in Penang, an action would lie in Scotland notwithstanding the fact that by the *lex loci delicti* verbal slander was not actionable without proof of special damage; and the opinion was expressed that the case must be decided as though the slander had been uttered in Scotland, *i.e.*, in accordance with Scots law.

The present submission (which is admittedly heterodox) is not that liability for tort should be governed by the nationality, the domicile, or the residence of the parties, but that there is room for applying what may be called the proper law of the tort; and that these factors, together with the place of tort, ought to receive their due weight in deciding what is the proper law of the tort, just as they do when the question is what is the proper law of a contract.

It is greatly to be hoped, though perhaps hardly to be expected, that the case of *McElroy* v. *McAllister* will be carried to the House of Lords, and that the House will take the opportunity to restate the English conflict of laws rules for tort liability in the light of modern conditions.

J. H. C. M.

REVIEWS

Inner Temple Papers. By Sir Frank Douglas MacKinnon. [London: Stevens & Sons, Ltd. 1948. vii and 236 pp. 21s. net.]

The late Lord Justice MacKinnon's earlier literary work, which largely consisted of admirable editions of *Scrutton on Charterparties and Bills of Lading*, was marked by fine scholarship and an obvious antiquarian interest in the earlier history of those commercial documents. The busy life of a commercial court leader did not leave him much time to pursue this latter bent, but with the greater leisure available on his promotion to the bench he began to devote a good deal of time to the study of eighteenth century London and also to legal antiquarianism, where he worked particularly on the history of his own Inn of Court, the Inner Temple, and on what I may perhaps call the more decorative side of the life and work of the judges. Letters in the *Times* and notes in the *Times Literary Supplement*, and above all in the *Law Quarterly Review*, delighted all lawyers who had any feeling beyond the mere technicalities of the law and of professional work.

In this volume most of his letters and notes about Inner Temple matters are collected, together with a good deal of new material and in particular a careful description of the damage done by enemy action in the Inner Temple in 1940, together with a series of before and after photographs which will bring a lump to the throat of every loyal member of the Inn. Of the other papers we may mention in particular 'The Last Revel and the Ritual of Revels' and 'The Old Benchers'. In Tudor and Jacobean England the Inns of Court revels were an outstanding feature of the cultural life of London. They survived into the eighteenth century when the last one was held in February, 1733–4, and Sir Frank MacKinnon was able to obtain a pretty detailed account of it. The essay on the Old Benchers is already well known as an introduction to an edition of Lamb's essay of this title which appeared some years ago. Those who enjoyed it then will be glad to have it here substantially amplified with interesting new material.

It is hardly necessary to add that these essays and notes make an appeal far wider than to members of the Inner Temple or indeed of the legal profession. Those who enjoy strolling along the byeways of the past can wish for no better guide than this urbane and whimsical judge whose pleasant and discursive style provides a comfortable vehicle for a tour along many little-frequented roads.

Attention should perhaps be drawn to a mistake in the postscript to the second chapter which deals with Roger North and his practice at the bar. Sir Frank MacKinnon was concerned to show that this was due to nepotism in that he was much 'briefed to appear before his brothers, first at Common Law before the Lord Chief Justice, and then . . . before the Lord Chancellor'. The truth is that brother Francis was first of all Chief Justice (not Lord Chief Justice) of the Common Pleas, and was afterwards promoted to Lord Keeper and then Lord Chancellor. There were other brothers of considerable eminence but none became a judge. This is certainly an unexpected lapse on the part of an author whose scholarship is as a rule remarkably accurate.

As a final comment we may remark that there is no indication anywhere in the book that the author has died. His sudden death was a great shock to bench and bar, and a short appreciation of his work in the law might well have prefaced this collection of his papers.

Chorley.

JEREMY BENTHAM AND THE LAW. A Symposium. Edited by G. W. KEETON and G. SCHWARZENBERGER on behalf of the Faculty of Laws of University College, London. [London: Stevens & Sons, Ltd. 1948. 263 pp. 20s. net.]

IT was a happy inspiration that Professor Keeton, Dean of the Faculty of Laws of University College, London, and his staff should commemorate by a symposium the two hundredth anniversary of the birth, on February 15, 1748, of Jeremy Bentham, who was a member of the first committee for the promotion of the college, and is honoured with its founders. The volume contains thirteen articles, eight of which were written by members of the faculty, and five by others. It is the only available synopsis of Bentham's activities in the legal field; a second edition somewhat simplified and prefaced by a short biography would be a great boon to beginners, and would make him better known in the second half of the twentieth century than he has been in the first.

A reviewer, if he is to be fair to so many contributions, must limit himself to a brief reference to the content of each.

Professor Jolowicz' 'Was Bentham a Lawyer?' is the most original of the articles, displaying in acute observations much reading and thought, under a title which is, perhaps, happier for a lecture (the purpose for which it was written) than for an article. His emphasis is upon the insight which Bentham displayed in his analytical work. Much of Austin's analysis, familiar to generations of students, was in truth Bentham's, and was of great originality. Similarly, the importance of the machinery of legislation, which is easily apparent to anyone equipped with a modern manual of constitutional law, Bentham saw for himself unaided, 'and to see it in his age required a most uncommon power of penetration through form to essence, and a remarkable freedom from inherited ways of legal thought'.

Dr. Margery Fry gives a balanced account of 'Bentham and English Penal Reform', showing how in his voluminous writings he elaborates on the one hand notions about punishment which are quite absurd, and on the other projects a searchlight into the future showing an astonishing 'foreknowledge of the way in which, after many years' delay, penal science was to move'. Miss Fry tells in a few pages the story of the ill-fated Panopticon scheme, which more than any other incident in Bentham's career shows how his mind was 'most distracted by his own fatal ingenuity'.

Dr. Zagday gives a short account of 'Bentham and the Poor Law', stressing his amazing prescience. A comparison between the details of an ideal administration worked out in the Constitutional Code and the hierarchy of today culminating in the Minister of Health shows a remarkable similarity.

The important subjects of Bentham's Influence on Civil Procedure and Evidence were entrusted to Dr. Zagday, Professor Keeton and Mr. Marshall. These papers are the fruit of careful research, and are valuable not only as a summary of Bentham's views, but also as a repository of references. For instance, attention is called to Denman's article in the *Edinburgh Review* in 1824, an important link between Bentham's criticisms of the existing law and the later Evidence Acts.

Professor Graveson's article, strangely named 'The Restless Spirit of English Law', takes it place appropriately if regarded as what it in fact is, namely, a survey of Bentham's influence on English private law. Within its obligatory limits it could hardly be better. But I must register a preference for Sir Arnold McNair's description of the eighteenth century as 'one of the most creative periods of our law' (*Dr. Johnson and the Law*, p. 1), as against Professor Graveson's description of it as 'notably conspicuous for its almost complete lack of legal reform and legal development'. Incidentally, the attribution (of which I, too, have been guilty) to the influence of Bentham of the limited liability of companies seems to lack confirmation at present. The idea was not Bentham's own. It was at least as old as an Irish statute to

which he refers in 1794 (*Works*, X, 304). Dr. Stark tells me that within the period which he has studied, ending in 1804, the suggestion is mentioned several times by Bentham but is never seriously worked out.

Mr. FitzGerald's article on 'Bentham and Parliamentary Reform' is one of the most interesting in the book, but I question whether this is an appropriate place for speculation as to how Bentham would react, if he were living, to the views of the Electoral Conference of 1944, and to the present-day relation between Members of Parliament and their constituents.

The editors did well to secure the co-operation of that great American scholar, Professor C. W. Everett, to whom students of Bentham owe so much. Prominent Americans with whom Bentham was in contact from time to time were Aaron Burr (Vice-President, 1800) who stayed in Bentham's London house in 1808; Albert Gallatin who was in London as one of the commissioners to negotiate peace in 1814; and John Quincy Adams, who was Minister to England from 1814 to 1817. But these men do not seem to have contributed to the spread of his ideas. It was Edward Livingston (1764–1836) who, fortified, as he himself wrote to Bentham, by the perusal of the Bentham-Dumont publications, drafted for the State of Louisiana a 'System of Penal Law' in a series of codes. In August, 1829, he sent to Bentham so much of his system as was then in print. This did not include his Code of Evidence, completion of which he had delayed because he had only just succeeded in obtaining, after great difficulty, a copy of Bentham's *Rationale of Judicial Proof*. Livingston, whom Maine describes as 'the first legal genius of modern times', found a worthy successor in David Dudley Field of New York (1805–94), who drafted the Code of Civil Procedure which he persuaded the Legislature of New York State to enact in 1848, and which served as model for the codes of newly created States.

Although the amount of Bentham's published work devoted specifically to international law is small, yet the variety of ideas on the subject scattered through his writings is great. This appears clearly from Dr. Schwarzenberger's scholarly and well documented article, which by itself could easily be made the subject of a review. Indeed it would almost seem as if few of the general ideas of modern international lawyers, whether naive or realistic, are without counterpart among Bentham's utterances. The author mentions as illustrative of Bentham's thoroughness his unpublished notes on contemporary British prize law, based on the six volumes of Robinson's *Admiralty Reports*, 1799 to 1808.

Dr. Lipstein has made a gallant attempt to answer the question how much influence Bentham had abroad. One knows that Dumont's publications were translated into many languages, and that Bentham's name was widely venerated, notably in France and Spain. But with what practical results, if any? Dr. Lipstein writes that it is impossible not to agree with Holévy's opinion that Bentham's influence in France and Germany was infinitesimal. On the other hand, Chauveau and Hélie, and R. Garraud (cited by Dr. Radzinowicz in his *History of English Criminal Law*, Vol. 1, p. 358) regarded the influence of Bentham's doctrines upon the French penal code of 1810 as fundamental.

As regards South America, Bentham was in correspondence with Bolivar, the Liberator, creator of five Republics; with Rivadavia of the Argentine; with Colonel Hall of Colombia; with Miranda of Venezuela; with San Martin of Peru; with José del Valle of Guatemala. But although these great men paid him tributes of admiration, the practical consequences of their admiration are not readily discernible.

Professor Vesey-FitzGerald's short article on 'Bentham and the Indian Codes', packed with information, tells us that as far back as 1782 Bentham was studying Indian affairs deeply, and with remarkable understanding. This interest was maintained throughout his life; in 1829 he drafted (and may have sent) a letter to Lord William Bentinck, Governor-General of Bengal, calling for legislative reform. In 1833 Macaulay introduced the Bill which became

the Charter Act, and set up a commission to prepare a code of laws for India; his speech echoed words used by Bentham half a century before. Of the original commissioners Macaulay was an admirer and Cameron a professed disciple of Bentham, so that it is not surprising that their Indian Penal Code contains reflections of Bentham's views.

Professor Friedmann emphasises the fundamental importance of the second part of Bentham's *Principles of Morals and Legislation,* left unpublished until 1945, when it was edited by Professor Everett under the title *The Limits of Jurisprudence Defined.* This work, 'written in 1782, and characterised by a transcendent lucidity of thought as well as of style', anticipates the reasoning on a number of points of jurists as modern as Hohfeld and Kelsen.

It is appropriate that a philosopher should conclude the symposium with an examination of the meaning, the logic, and the usefulness of Bentham's 'principle of utility'. Of Professor Ayer's summary I have not room to say more than that it is essential that anyone interested in Bentham should read it not once but several times.

The book is attractively produced: Messrs. Stevens can be relied upon to see to that. It contains as frontispiece a photograph of a charming portrait of Bentham in his prime.

H. A. Hollond.

Education for Professional Responsibility. A Report of the Proceedings of the Inter-Professions Conference on Education for Professional Responsibility held at Buck Hill Falls, Pennsylvania, April 12, 13 and 14, 1948. [Pittsburgh : Carnegie Press; Carnegie Institute of Technology. 1948. 207 pp. Price not marked.]

This is a collection of papers read to a conference of one hundred American teachers from schools of divinity, medicine, law, engineering and business. It contains some glimpses of the obvious (one medical contributor bids us remember that 'the student-cadaver relationship is different from the student-patient relationship') but it also contains much that is shrewd, sensible and suggestive. The legal contributors are all very conscious that mere knowledge of legal rules is not enough to make a good lawyer, and that the law school should at least open the student's eyes to his further needs. Professor Lon Fuller of Harvard observes that 'legislative' skill is required not only of the administrative lawyer but also of the private lawyer who has to take or help others to take 'business decisions'. The atmosphere in which he works may vary from the leisurely peace of the family solicitor drafting a will or a settlement to the fever of negotiating a labour contract on the waterfront under threat of a strike but (unless he is employed merely as a mechanical translator of other men's instructions into legal language) he has essentially the same task, that of advising on the adjustment of conflicting claims. As Professor Llewellyn of Columbia puts it, 'even "private" law is shot through with problems of general welfare'. Dean Katz of Chicago likewise insists on the need of training students to form 'policy judgments', both by giving them experience of research into 'policy problems' in conjunction with the economists and the sociologists and by setting them on the way to develop for themselves a coherent moral and political philosophy; in this connection he offers some interesting opinions on the value of introducing law students to the writings of psychological investigators of society like Knight and Ranyard West.

All this may sound over-ambitious. Are we, as Professor Fuller himself asks, to break the poor student's back not with the proverbial straw but with a whole haystack? Yet we cannot dismiss these suggestions offhand as obviously impracticable; they are made by experienced teachers who are well aware of the practical difficulties. There are two ways in which the burden

may be lightened. In the first place, these writers seem to be in general agreement that teaching, so far as the law school is concerned, should be selective and should aim rather at training the student in principles and 'processes' than at imparting knowledge of details. In the second place, much time and effort can be saved by choice of the best method for the particular end. Professor Llewellyn not only criticises the way in which the case-method is used in some American schools but vigorously indicates its inherent and inescapable limitations. 'Man could hardly devise a more wasteful method of imparting information about subject-matter . . . information, as such, can be packed into books. Its acquisition can be guided by syllabus and lecture . . . the case class is a class in doing'. He has also a word to say about other educative methods, praising especially the student-run Law Review.

We teachers on this side of the Atlantic have similar problems: how to combine general education with technical training; how far to aim at imparting information and how far at forming the student's mind; which parts of legal science can best be learned in the law school and which in practical office work; and, at the present moment, what alterations in our traditional curricula and methods may be necessary to produce a generation of lawyers fitted to deal with the legal problems of a planned society. The opinions of these distinguished American colleagues deserve our study. They may provoke us to self-questioning; they may give us some new ideas.

A. H. Campbell.

Criminal Justice and Social Reconstruction. By Dr. Hermann Mannheim, Reader in Criminology in the University of London. [London: Kegan Paul, Trench, Trubner & Co., Ltd. 1946. 290 pp. 15s. net.]

While the present discussion on penal reform is almost exclusively concerned with the fate of the convicted criminal Dr. Hermann Mannheim's book, published nearly three years ago in the late Professor Karl Mannheim's series on Sociology and Social Reconstruction, goes down to the essence of criminal law itself. Which functions, he asks, should be assigned to criminal law in a Europe rebuilt on rational principles, which types of human behaviour should rightly be called criminal and repressed by legal punishment? This proves to be a most stimulating approach, the more so as the author pursues his object with the profound knowledge and wide range of reading which distinguished his previous books. Many of his legislative proposals bear witness of a considerate judgment and moderation. This applies especially to suggestions with regard to substantive criminal law. Differentiation of homicide, a restriction of the criminal cases of homosexual activities, an unprejudiced approach to euthanasia, sterilisation and birth control, a resolute stand against taxation frauds, monopolistic exploitation and other 'white-collar offences', all this will help to make criminal law more effective and more realistic. Much consideration is given to the present critical situation in the protection of property. The traditional inhibitions against trespassing on other people's property seem to be based on personal respect for one's fellowman. They are effective with regard to the visible physical possession of an individual owner, but they dwindle lamentably if faced with a merely constructive legal relationship to an anonymous corporation or the community. In an age of economic concentration and growing nationalisation criminal law is indeed confronted with a new task which, however, cannot be performed satisfactorily by punitive sanctions alone.

In the field of criminal procedure Dr. Mannheim's views are more controversial. He disfavours trial by jury, and prefers to the traditional magistrates' courts a mixed bench of lay assessors presided over by a professional judge.

In this his views have recently been corroborated by Mr. Claud Mullins. Dr. Mannheim provides instructive evidence to strengthen the case of special Treatment Tribunals, though he is still moderate with his own proposals. I cannot agree with the tendency of divesting ordinary law courts of their traditional functions. If fact-finding Committees, Licensing Boards, and Administrative Tribunals assess and evaluate the facts, and Treatment Tribunals of criminological experts select sentences and supervise their administration, law courts will be left to find the defendant either innocent or guilty, more than often in the formal sense of doing something without licence or in violation of a special regulation. Generations vary in what they regard as safeguards of civil liberties. In the nineteenth century men put their trust in an independent judiciary, trial by jury, and lay magistrates. Today many people, conscious of the growing complexity of life, call for the expert and specialist. However, those twofold restrictions of the functions of the law courts are a counsel of despair. It should not be impossible to adapt the law courts to present social needs. English law with the interval between conviction and sentence is even better equipped for this purpose than other legal systems. The experience on the European Continent showed that courts of law persisted longer than any other public machinery in defending law and justice against totalitarian encroachment. To a satisfactory system of legal aid, acceptance of a public obligation by a free profession seems preferable to a public defender who either means different lines of defence for the rich and the poor or else anticipates the end of free advocacy altogether.

Dr. Mannheim's book is not confined to technical legal questions. He takes a further significant step and visualises the system of values which, in his opinion, will be the foundation of any lasting legal order of the future. In this important topic of his book, critics with different viewpoints will quite naturally disagree with some of the author's conclusions. As the outcome of the present spiritual crisis Dr. Mannheim accepts a reorientation of values which not only supplements, but largely supplants the traditional individualistic outlook by a new collectivism. This ideological basis is less manifest in the solution of specific legal questions and legislative proposals, than in a change of emphasis. Individual homicide loses something of its unique significance, while negligence causing fatal danger to many assumes a more serious character. Theft, for centuries the arch-crime against property, gets a rival in waste. The crude taking of things, indiscriminately made punishable for the benefit of the possessor, gives way to newly brandished forms of profiteering, public frauds, monopolistic activities and other 'white-collar crimes' against the exploited masses. But even supposing, for the sake of argument, that Dr. Mannheim's proposition is right as a diagnosis of our time, criminal law is, or ought to be, more than an instrument for the enforcement of current social and economic ideas. It must, if only at the same time, preserve a neutral character, and it fails when it is not compatible with certain general ethical standards rooted in human conscience. In the light of what happened in recent history, 'the sifting of the human material to be used for the construction of the new World Order' (p. 18) ought never again to be a legitimate object of criminal law. One may well ask whether the increased protection against theft from a dwelling-house in traditional criminal law is really an unjustified 'halo' because, unfortunately, some people had to live, and even do live, under appalling slum conditions. And if the author, in defending Russia against the accusation of class justice, asserts that what happened there was 'no more than an undoing of old wrongs' in feudal and capitalist Europe (p. 140), the answer is surely that justice requires not a new turn in social injustice, but the disruption of the fatal chain of successive wrongs.

Nobody will claim that in such fundamental issues his opinions are less subjective than the author's views. But the point is this: Progressive and reasonable proposals for reform—and there are many in this book—should not

be identified with a one-sided political doctrine. Recent history of criminal law in Europe offers many illustrations of legal concepts and statutory provisions, acceptable and useful in themselves, which were distorted beyond recognition by the political intention for which they had been introduced.

M. Grunhut.

Fifteen Years Hard Labour. By Claud Mullins. [London: Victor Gollancz, Ltd. 208 pp. 12s. 6d. net.]

This is a very readable book, and on the whole a worthwhile book for those interested in penology, though Mr. Mullins has already worked over most of what he has to say in that field rather more thoroughly in earlier volumes. However, here his thoughts on the subject are strung together on an autobiographical string in a way which will make them more attractive to the ordinary reader. Moreover, Mr. Mullins has had a career of a wider character than that of the average stipendiary magistrate, having begun life as a clerk in the L.C.C., having worked as a free-lance journalist, and having been a member of the British delegation at the Leipzig trials. We view his work, therefore, against a wide background

Not the least interesting part of the book is the way the character of the author comes through. It is easy to understand why Mr. Mullins often found himself in a minority of one among his fellow magistrates. He is obviously a sensitive personality—the stupid attacks upon him when he equited 'housekeeper' with 'mistress' in one of his cases made him actually ill—and such a person if he wishes to take part in public affairs, particularly as a reformer, has to develop a pachydermatous and prickly exterior: the prickles, however, are not pleasant to the persons who come in contact with him, and Mr. Mullins is always so sure that his opinions are right, that almost all who disagree with him must have felt the pricks from time to time. Mr. Mullins is naturally conservative in outlook, but he has the great virtue, fortunately not rare among English conservatives, that when the business of life forces him into intimate contact with the abuses which, generally speaking, conservatives are prepared to overlook, his instinct of justice forces his mind to grapple with the social problems which they raise and he becomes within the narrow limits of his experience a reformer, and often a most effective reformer. This comes out very clearly in this book. Mr. Mullins can and does form the superficial and indeed dangerous view of the man in the street on all sorts of wide questions of politics in which he takes his information from the *Daily Telegraph*, as where, for example, he admits that terroristic acts by Jews in Palestine placed a severe strain upon his formerly benevolent attitude towards the Jews of London. But on all matters of reasonable reform both of procedure and punishment in the magistrates' court where he knows by experience what he is talking about, Mr. Mullins is sane and sensible.

And what an opposition his work has roused among his fellow magistrates. His character sketches of successive chief magistrates at Bow Street are most illuminating. The unsatisfactory nature of the present method, or rather lack of method, in the appointment of metropolitan magistrates could hardly be brought out more clearly. The long and tough struggles which confronted Mr. Mullins in his efforts to secure simple and obvious procedural reforms in the magistrates' courts, reforms which everyone now takes for granted, throw a very dim light on the magistrates and civil servants who obstructed him, or who from sheer apathy nearly fought him to a standstill by their delaying tactics. I have read few books which bring out so clearly the endless irritations and frustrations which await those sanguine and enthusiastic citizens who set out to reform the abuses of society, and make life easier and more decent for their fellows. Montaigne in a discussion of law reform in one of his essays refers to the rule which prevailed among the Germans in early times,

that he who proposed an alteration in the law must come before the assembly with a halter round his neck. Law reformers still take their lives in their hands, even though it be in no such direct physical sense.

Mr. Mullins has many acute and pertinent observations to make on such matters as the police, the training of magistrates, the psychological factors in delinquency and the need to attend to and take care of them, the need for civil servants in the Home Office to leave their desks and see how the administration of justice actually works in the courts—advice the wisdom of which should be apparent in fields much wider than those of criminal justice. His frank exposition of his own reaction to the criminals brought before him, his successes, and not infrequent, failures, his reflections upon the reasons for both, and his many other observations upon the work of the magistrates' courts make his book very worthwhile reading for all justices of the peace, and he never becomes so technical as to get beyond the grasp of the least instructed. Here and there he falls into a surprising error of fact, as where he terms Dr. R. M. Jackson of Cambridge, who incidentally was secretary to the Roche Committee and the du Parcq Royal Commission, as 'an American professor', but these lapses are few.

C.

THE GOVERNMENT OF CANADA. By ROBERT MACGREGOR DAWSON, M.A., D.SC.(Econ.), Toronto, Canada. [The University of Toronto Press, 1947. x and 662 pp. $5.50.]

WHAT a feast this book is. It whets the reader's appetite, and no matter how gargantuan his appetite, he knows, when he has finished the book, that not only has he that comfortable feeling produced only by complete satisfaction, but that there is still an enormous store of knowledge between its two covers available for future consumption. It is a volume one will turn to over and over again for enlightenment and instruction.

It is a valuable study of the way in which the Canadian constitution is made to work. Far too many people in the United Kingdom, when thinking of that constitution, have only in mind its legal framework, consisting mainly of the British North America Act, 1867, and Professor Dawson's reminder (p. 72) that the unwritten constitution, consisting of established usages and customs, is every whit as important as the Acts of the United Kingdom Parliament and has, by its operation, made the written constitution almost unrecognisable, is most timely.

The citizen in the United Kingdom will, when reading the book, find himself, because of the close similarities between his position and that of his opposite number in the Dominion, making involuntary comparisons between Canada and the United Kingdom. He will agree with the view (see p. 86) that present trends necessitate the singling out for stronger constitutional protection of certain fundamental liberties and privileges 'so that they will not be at the mercy of any intolerant group in a Legislature or a Cabinet which may for a time happen to command a majority', and feel pleased that the attempt of the Dominion Legislature in 1937 to prevent the validity of its own legislation being challenged in the courts was declared ultra vires (p. 94), thus protecting the right of access to the courts, as was done in our own case of *Chester* v. *Bateson* [1920] 1 K.B. 829.

The chapter dealing with the Canadian Cabinet is of great interest to the English reader. The holders of certain offices in the United Kingdom, *e.g.*, the Chancellor of the Exchequer, are usually members of the British Cabinet, but their headship of government departments does not entitle them ex officio to seats in the Cabinet, as it would in Canada (p. 199), and, of course, the British Prime Minister has not to cope with the tricky problem of giving each Province at least one seat in the Cabinet (p. 211) to ensure the federal

character of the Cabinet. As pointed out on p. 261, adherence to the representative federal principle means a total of at least sixteen members, against the ideal number of ten to twelve, and it seems that steps will have to be taken to solve this problem of an unwieldy Cabinet. Professor Dawson suggests (pp. 264–5) that the Cabinet could be reduced to ten to twelve members by only including those who hold key positions and leaving out, *e.g.*, the Postmaster-General, the Ministers of Transport and Pensions, and the Solicitor-General. It would appear that a Canadian Cabinet Minister does not receive a full copy of Cabinet conclusions, as does a member of the British Cabinet, but is merely informed and reminded of Cabinet decisions by the Privy Council Office (p. 274). Has a member of the Canadian Cabinet, on ceasing to hold Cabinet rank, to return all copies of Cabinet papers given to him while a member, as has a British Cabinet Minister?

It is interesting to note that the Prince of Wales, the British Prime Minister, and the Canadian High Commissioner in London, have been members of the Canadian Privy Council (p. 201); that the Canadian Privy Council has never held a meeting since its creation in 1867 (p. 201); that the Governor-General is not President of the Privy Council; and that orders and minutes of Council are passed by the Cabinet and forwarded to him for approval and signature (p. 202). This is in contrast with the British Privy Council, which frequently holds meetings, at many of which the King himself presides.

We, too, in the United Kingdom are endeavouring to solve the problems (see pp. 291–3) caused by the boards which have become an integral part of government enterprise. Most fair-minded persons, while agreeing that these boards should have a substantial measure of independence and should not be hampered by the restrictions usually associated with government departments, are apprehensive of the extent to which these boards are outside ordinary parliamentary control. In the United Kingdom, the Speaker of the House of Commons allows questions to be put to Ministers on major, but not minor, points arising out of the administration of these boards. But what is a minor point? As these boards have control of activities directly affecting the every-day life of the ordinary individual, adequate parliamentary control of them is a matter of high constitutional importance, and it is a problem which must be satisfactorily settled before it is too late. Also, the problem of administrative powers is of common concern, and no satisfaction can be obtained from the fact that we have done what the Canadians have done, namely, failed to develop administrative tribunals and a body of administrative law adequate to control the exercise of the new State powers (see p. 318). The grave dangers of delegated legislation were brought home to Canadians by the use made in 1946, in connection with the spy investigation, of the Orders in Council passed secretly in 1945; and the refusal of Mr. Justice Thorson in *Pure Spring Co.* v. *Minister of National Revenue* (1946) Ex.C.R. 471, to examine or criticise the reasons that led the Minister to his opinion or question their adequacy or sufficiency (see p. 323), corresponded with the attitude of the majority of the Law Lords in the English case of *Liversidge* v. *Anderson* [1941] 3 All E.R. 338, and revealed another danger to the ordinary individual.

As to the difficulties mentioned by Professor Dawson of determining boundary constituencies and redistributing seats in the lower House, it may be that the permanent systems of Boundary Commissions and redistribution of seats set up for the United Kingdom by the (English) House of Commons (Redistribution of Seats) Act, 1944, could be adapted for Canada, although it is realised, of course, that the Canadian problem is not on all fours with that which had to be dealt with in the United Kingdom.

Whilst it is sensible to allow a member of the lower House to resign his seat for adequate reasons (p. 394), and to limit speeches of back-benchers to forty minutes (p. 417), provisions which might with profit be adopted in the United Kingdom, is it as sensible to pay a member of that House an indemnity

(*i.e.*, a salary) of $4,000 a session plus $2,000 a year, tax free, which is practically $8,000 a year (p. 395), and $16,000 a year to a judge of the Canadian Supreme Court (p. 467) and $12,000 a year to a judge of a Provincial Court of Appeal or High Court (p. 468)? It is suggested that the generous payment to the part-time politician and the relatively low scale of remuneration for the full-time judge may lead to a lowering of standards in both spheres. The statutory rule that a judge, when employed in extra-judicial work, say as a member of a Royal Commission, is not allowed to receive any extra remuneration but may receive a living allowance, and that the latter in one case amounted to $18,400 in a little over two years (p. 487), seems odd to an English lawyer, who may be forgiven if he prefers the English system, under which, *e.g.*, Mr. Justice Lynskey received no extra payment for presiding over the recent tribunal which sat to inquire into allegations involving certain members of the British Government.

There are one or two matters where the present reviewer is not in complete agreement with Professor Dawson. Thus, having regard to the realistic attitude of the Judicial Committee of the Privy Council in *Att.-Gen. of Ontario* v. *Att.-Gen. of Canada* [1947] 1 D.L.R. 801; [1947] 1 All E.R. 137, he thinks it is not right to say that 'the brief moment of judicial enlightenment did not come again . . . ' (see p. 160), and he would have thought that in the light of the wonderful welcome given to the King when he visited Canada one could not say that 'Canadians never look upon the Monarchy with the same regard which is usually bestowed on it in Britain . . . ' (p. 165).

Events happen quickly. In the relatively short time that has elapsed since the publication of Professor Dawson's work, Canada and Newfoundland have agreed the terms on which the latter is to become the tenth Canadian Province, the powers of the Governor-General have been increased so that his position more nearly approaches that of the Sovereign (pp. 172 and 174), and Ministers have been given a right of audience in both Houses.

The book is so up-to-date that one wonders why Professor Dawson refers to the eighth edition of Dicey's work, *The Law of the Constitution* (see the footnotes on pp. 82, 170 and 313) instead of the ninth. Also, would it not have been desirable to have given on p. 113, para. (d), the reference to the case which held ultra vires the Dominion law dealing with the compulsory investigation of certain industrial disputes?

Solely with a view to assisting the publishers, and not in any way by way of criticism, the reviewer mentions the following errors, *viz.*, p. 111, line 9, 'clauses' for 'classes'; p. 251, footnote 4, 'practiced' for 'practised'; p. 321, line 28, 'o' for 'of'; p. 476, line 11, 'retaied' for 'retained'; and inquires if footnote 1 on p. 469 should read 'Thus in 1928 Saskatchewan had twenty-three district judges but only eighteen judicial districts . . .', as this would then apparently support the statement in the penultimate line of p. 469 that the number of judges was excessive.

Professor Dawson's gift of lucid exposition and his erudition have produced a great and indispensable work, and the author is entitled to the grateful thanks of all serious students of constitutional affairs.

RICHARD C. FITZGERALD.

THE CRISIS IN THE LAW OF NATIONS. By H. A. SMITH, D.C.L. (Published under the auspices of the London Institute of World Affairs.) [London: Stevens & Sons, Ltd. 1947. 102 pp. 7s. 6d.]

THE opening paragraph of this little book, which consists, principally, in a series of lectures delivered by Dr. Smith in the Universities of Istanbul and Athens, declares that today '. . . the standard textbooks do not give us answers to the questions which the course of events compels us to ask? This applies

not only to the ancient and classical works, such as those of Grotius and his successors, but also to those books which are generally accepted as authorities in our own day. . . . As we study these books we seem to be looking at the picture of a world which has largely passed away. The language in which the authors write, and the ideas which they seek to express, belong to the later years of the nineteenth century and the opening years of the twentieth. But the world in which we now live is more remote from that of our fathers than that of our fathers from the age of Grotius'. The Grotian system, designed for a community of States with a common cultural background, has broken down because of the disappearance of the common assumptions formerly underlying the practice of the principal States. Without a common will *for* the community the system cannot be restored, and it is not restored by, for instance, the Charter of the United Nations, which, to the surprise of none, has brushed law into the background of international life. 'In a word', Dr. Smith concludes, 'the world cannot be saved except by a common faith. At this point it will be obvious that the mere lawyer has reached the limit of what he can usefully say'. The passages quoted, which sufficiently indicate not only the theme but also the lucidity of this work, introduce and conclude a penetrating survey of the recent history of international law the accuracy of which few will dispute though many will be disposed to reject its implications.

Clive Parry.

International Contracts. By G. C. Cheshire, d.c.l., f.b.a. [Glasgow : Jackson, Son & Co. 1948. 90 pp. 6s.]

The fine tradition of the annual Gilbert Murray Lecture in the University of Glasgow has not only been maintained by the Vinerian Professor's address on International Contracts, but greatly enriched by the critical and practical analysis of that subject by a self-described 'mere lawyer'.

The subject of this monograph is the choice of law problem in contracts in private international law. Its treatment is distinguished from the traditional textbook approach chiefly in two respects: English cases over much of the field have been re-examined and, in several places, a new interpretation has been put upon them; and, particularly on the topic of the law which governs essential validity of a contract, a valuable analysis has been made with the object of showing that 'essential validity' is a general term comprising several matters not necessarily governed by the same law. On the general question of the nature of proper law, Professor Cheshire argues that the correct approach, and one which the English courts have adopted in all cases except the *Vita Food Case*,[1] is purely objective and based upon 'the grouping of the various elements of the contract as they are reflected in its formation and its terms' (p. 12). He is met by judicial and juristic statements stretching from Lord Mansfield [2] to Dr. Martin Wolff,[3] which state clearly enough that the law which shall govern a contract is that which the parties intended should do so. Do judges, then, mean what they say?

It is at this point that resort must be had to analysis, and the author lays down five propositions in his attempt to explain and delimit the scope of autonomy in the realm of choice of law. The limits of free will are, in the first place, restricted by the need to distinguish the creation from the substance of an obligation, once it has been created. The autonomy of the parties, according to the learned author, does not extend to the creation of the obligation. 'It is not for the parties to choose what law shall govern their agreement; it is for

[1] *Vita Food Products* v. *Unus Shipping Co.* [1939] A.C. 277.
[2] *Robinson* v. *Bland* (1760) 1 W.Bl. 258–9.
[3] *Private International Law* (1945) p. 427. For other statements of this principle, see Professor Cheshire's lecture, pp. 16–17.

the law to determine what agreements it will govern' (at p. 19). There follow words which contain an unfortunate ambiguity: 'It is idle to maintain that a court can be deprived at the caprice of the parties of control over a contractual question which it regards as subject to its authority'. For here, at the risk of being charged with idle quibbling, the writer would suggest that the questions of choice of law and choice of jurisdiction have become somewhat confused.

The author's third and 'somewhat heretical contention' (at p. 23) is reminiscent of the provisions of the Polish law of 1926, limiting the freedom of choice to certain specified legal systems with which a contract is connected.[4] Professor Cheshire writes: 'When it is said that the proper law is a matter of intention, all that is meant is that the parties are free to choose the connecting factors, but that, having done this, they are taken to intend that the governing law shall be the law of the country in which the chosen factors show the contract to be localized'. This is indeed a modern version of freedom, comparable to the freedom to vote for a Government-selected candidate, a freedom which at first sight appears to be so much out of accord with the traditional spirit of the common law in matters of individual liberty as to raise grave doubts of its validity as a statement of the practice of English judges in a line of cases drawn from the period of maximum liberty of contracting.[5] The author, analysing the 'substantial connection' theory of Westlake and the 'intention' theory of Dicey, concludes that there is no substantial difference between them (at p. 27). The part which Professor Cheshire assigns to the intention of the parties in the choice of the proper law is purely secondary, consisting of their selection of what the court considers to be connecting factors, *e.g.*, place of contracting, place of performance; in other words, where the constituent acts of an obligation shall be carried out. This view may be in one respect too narrow, in another too wide. For, one may ask, may the parties invariably choose even so much? May they entirely choose the place of contracting, for example, or is not even this fundamental factor, in part at least, selected for them by rules of law as to the time and place of acceptance of an offer; rules which, as Professor Cheshire has pointed out, vary from country to country? Within the limits of this choice the parties are free. But the selection of the proper law, according to the learned author, is a purely judicial function to be exercised on the basis of the connecting factors so chosen.

'It is here', writes Cheshire, 'that it is vital to distinguish what the judges have done from what they have said' (at p. 28), making the submission that, 'in practically every case where the law chosen by the parties has been accepted by the courts it has been the law of the country with which in fact the contract is most closely connected' (at p. 29). No lawyer would be likely to dispute this submission. But it is not inconsistent with the intention theory of the proper law. By all means let us have realism, and look to results rather than reasons. But let us not forget the danger of realism becoming surrealism. Judges can only act through words, and however defective this medium may be, it is the only one at their command. One must assume that judges sometimes, at least, mean what they say; and if the result accords with the reasoning they use, that reasoning is entitled to acceptance in preference to any alternative explanation of results which is not more satisfactory, more comprehensive or more in accord with principle. And any submission that the result of a case is capable of a rational explanation superior in one of the ways indicated to that employed by the judge would seem to call for a statement of the judge's motive in ignoring or rejecting the true ratio decidendi. Such a motive may

[4] See Professor Kuratowski's article in *Studies in Polish and Comparative Law* (1945), pp. 110 ff.

[5] *Lloyd* v. *Guibert* (1865) L.R. 1 Q.B. 115; *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q.B.D. 589; *R.* v. *International Trustee* [1937] A.C. 500.

well exist, for example, in the desire to distinguish authoritative precedents of an earlier age; but Professor Cheshire does not explain why judges should consider it necessary to impute a fictitious intention to parties and confer on them a fictitious power of selection of the proper law to govern their contracts.

The learned author finds some difficulty in bringing into line with his objective theory those cases in which parties have expressly provided for arbitration of disputes by the courts or arbitrators of a particular country. The importance of this fact rests, it is thought, in the survival of the early eighteenth century principle, '*qui eligit judicem eligit jus*', a principle which clearly ante-dates the separation of the questions of choice of jurisdiction and choice of law already apparent by the time of *Robinson* v. *Bland*.[6] The consequence is that a freedom to choose arbitration by the courts of any country is almost invariably regarded as a selection of the law of those courts to govern the substance of the contract, a conclusion which leads the learned author reluctantly to admit the possibility of a choice of any law in the world through the medium of an arbitration clause. But even so, the case for the objective theory of proper law in respect of arbitration clauses is stronger than its most distinguished advocate has argued; for, in the first place, an arbitration clause itself constitutes a connecting factor with the chosen law. Secondly, there are no English cases known to the writer[7] in which any courts or persons other than English were chosen by parties to arbitrate between them; and the natural inclination of an English court or a member of an English stock exchange to apply his own law is not only a notorious tendency, but a practice warmly welcomed among foreign merchants, for whom English arbitration on the principles of English mercantile law is, or at least was, a rock of salvation in an uncertain world. Thirdly, this very fact should make Professor Cheshire hesitate to admit that through the device of arbitration a choice of a foreign court would necessarily be treated in the same way by English courts as the choice of an English arbitrator, though doubtless it should be so treated. Lest it be thought, however, that the writer has at last seen the truth, let it be admitted that he is not convinced by his own arguments on this point.

The second part of Professor Cheshire's lecture deals with particular topics, such as contractual capacity, formation of the contract, interpretation, performance, discharge and remedies for breach of contract. Many points of interest arise from the penetrating analysis which this part contains, but it must suffice to mention only two or three. Professor Cheshire would submit the question of capacity to contract to the proper law in its objective sense, which, he asserts, somewhat surprisingly (at p. 46), 'is decisive upon such matters as . . . formal validity'. But the plea of incapacity by the proper law should not avail if capacity exists by the party's *lex domicilii* (p. 51).

The author makes a valuable distinction between the interpretation of the terms of a contract and their legal effect when so interpreted: the former being a pure question of fact in which no choice of law problem necessarily arises, while the latter, as part of 'the substance of the obligation' is governed, in Professor Cheshire's view, by the proper law in its objective sense. By the same law he would govern the question of whether a contract is voidable or not, as for misrepresentation (p. 82), though English authorities on the point are silent, and foreign decisions are few.

This monograph—for it is more than a lecture—not only constitutes a valuable and constructive contribution to the conflict of laws, but sets an example of the way in which the study of the subject could usefully develop in England, namely by individual and detailed treatment of specific topics. Along similar lines, but more comprehensive, are the well-known Harvard Studies in the Conflict of Laws, which have already won a high reputation in such limited fields as torts, characterisation and foreign judgments. The

[6] (1760) 1 W.Bl. 258.

[7] Though such may well exist, as I have had no time to look into this question, and speak only from memory.

lesson is now being repeated nearer home. Let us hope that it will be well learned.

This little book is well printed and produced, except that in the writer's copy sixteen pages (39–54) are duplicated. Misprints have been noticed only on pages 17 and 84. On the former, at note 1, 1860 should be 1760; while on page 84, note 1, 1762 should apparently be 1862, and *Aktiengesellschaft* in note 3 is misspelt.

R. H. Graveson.

Introduction to the Law of Contracts. By Sir Charles E. Odgers, M.A., B.C.L., Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1948. xxviii and 400 pp. 25s. net.]

This book stands midway between *Sutton and Shannon* and *Cheshire and Fifoot,* or, in other words, is an alternative to *Anson,* and is intended as a first introduction. As I like to think that I am no longer quite a beginner, I find it difficult to be sure whether, when a beginner, I should have found it more helpful than *Anson,* and if I express a slight preference for the latter this may be due to a sentimental attachment to the book that first introduced me to the intellectual delights of the Law of Contract picturesquely illustrated by carbolic smoke balls, undergraduates' fancy waistcoats and other nostalgic memories of the pre-atomic era. Sir Charles starts with one advantage over the editor of *Anson*; he wrote it anew in 1947 and was not called upon to tinker with a book originally published in 1879. This has enabled him to deal with certain topics more clearly and satisfactorily than *Anson* does; indeed it is clearly written throughout and a newly-articled clerk, to whom I lent it, found it most helpful and easily understandable. To my mind, however, it falls short of *Anson* in two respects, for only one of which Sir Charles is responsible.

First, it seems to me that the arrangement leaves something to be desired. One chapter, entitled ' Illegal, Void and Voidable Contracts ', is over 100 pages long (the articled clerk found it ' a lot to take in ') and into it are crowded Misrepresentation, Mistake, Duress and Undue Influence, and Impossibility and Frustration. No doubt a case can be made out for treating all of these under this title, but it is respectfully submitted that a case which results in a chapter of this inordinate length is a bad case and that in any event Frustration logically belongs under Discharge of Contract. Again, Limitation, and Set-off and Counterclaim are dealt with under Discharge and not, as I should have thought preferable, under Remedies.

Secondly, Sir Charles has unfortunately not been well served by his publishers. The printing is clear enough but the paper is indifferent and the binding, in bilious green cardboard, repellent. The difficulties under which publishers are at present labouring is appreciated, but a number of recent publications have shown that books which are a joy to handle and look at can be produced—and produced at a reasonable price, and this is not only by the University Presses. A study of these recent publications suggests that some publishers think that appearance is more important in the case of a practitioners' than a student's book and from a sales point of view this may be so. The practitioner buys what pleases him; the student buys what his teacher tells him to, and, in my experience, teachers are apt to overlook the importance of appearance and typography as aids to concentration. But, to my mind, their importance can scarcely be exaggerated. The student, unlike the practitioner and teacher, has to read and re-read the same book from cover to cover and he must be wooed if his attention is to be won and retained. In the initial winning of his attention the printer and publisher play a more important part than the author and in the subsequent retaining of his concentration they play a part which is only slightly less important. I well remember how difficult I found it to concentrate and how greatly I was

helped by the excellence of the production of *Anson* (an excellence maintained in the last edition), and it is for this reason, more than any other, that I personally will continue to recommend *Anson* rather than Sir Charles' book. For the defects in production the publishers cannot plead cheapness, as the book is considerably more expensive than *Anson* and than many other comparable publications, and its price seems to me to be excessive.

One final point: Is it too late to protest against the admission into the legal vocabulary of 'pseudo-quasi-contract' (p. 360)?

I hope this review will not be thought unfair or excessively personal. I realise that I have merely given my opinion on how this book compares with another, instead of extolling the many virtues of the book itself. But, as I understand it, the task of a reviewer is to indicate whether a new book meets a need either because it does something that has not been done before or because it does it better. The object and scope of this book seem to me to be identical with those of *Anson* and I can only express my personal opinion (for what it is worth) that for reasons largely beyond the learned author's control it is not an improvement.

L. C. B. G.

THE PRINCIPLES OF LIABILITY IN TORT. By HAROLD POTTER, LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London, King's College. [London: Sweet & Maxwell, Ltd. 1948. 75 pp. 10s. net.]

THIS is a reprint of the author's introductory chapter to the tenth edition of *Clerk and Lindsell on Torts,* produced so as to give to students and practitioners a review of principles in a more accessible and inexpensive form. It was certainly worth while to reprint this introduction, which otherwise might have been buried in a work which is probably never read right through and is used almost exclusively for the purpose of reference.

Professor Potter gives a penetrating and thorough analysis of the nature of tort, but, as he points out, the law on this subject is in a somewhat fluid state, so that (p. 3) 'old authorities must be viewed with suspicion when they involve any question of principle'. An illustration of this is to be found in the law of nuisance where (p. 37) 'of recent years the notions both of malice and of negligence have been introduced'. Under the heading of 'Tort as a Wrong' the subjects of accident, act of God, mistake and inevitable accident are discussed, although these would seem rather to be matters of defence and are so treated in *Pollock on Torts* (Chapter 4) and by Professor Winfield (*Law of Tort,* 4th ed., p. 23). They are subsequently referred to among the defences under the heading 'wrong not the act of the defendant'. This is, perhaps, hardly a happy way of describing 'act of God' and 'inevitable accident', where the defence succeeds because no wrong has been committed at all and, therefore, any damage the plaintiff may have suffered must lie where it falls.

It is by no means easy to find any general principles applicable to all torts and there will be few to differ from the author when he writes 'the law continues to be largely a collection of more or less independent torts governed each by its peculiar history'. Nevertheless this introduction is useful as showing how far there are principles common to the various torts. Are trespass, conversion and nuisance fighting a losing battle against the view that there is no liability without negligence or intention? The fact that they are in a minority does not necessarily show that they are, but a perusal of the part of this book headed 'tort as a wrong' will put any reader in a better position to form an opinion on the question.

A manful attempt is made to solve the problem of finding a definition of tort, and the conclusion that no definition is of much assistance in determining whether any given set of facts constitute a tort will find general acceptance.

There is a most useful section discussing the relation of contract and tort—a topic which has given rise to confusion in the past.

The book has a full list of contents, but neither an index nor a table of cases. This omission should be remedied.

J. Charlesworth.

The Law Relating to Assents. By W. J. Williams. [London : Butterworth & Co. (Publishers), Ltd. 1947. xix, 115 and [5] pp. 15s.]

This new work consists of eight chapters and five appendices. The chapter headings are: Introductory; Assents to Land after 1925; Form of Assent; Trusts for Sale and Statutory Trusts; Settled Land; Registered Land; Assent to Mortgage Debt; and Assents relating to Pure Personalty. The law and practice with respect to assents are described tersely and accurately. There are very few passages indeed in respect of which doubt or disagreement may be reasonably expressed. Two observations are made concerning the value of statements that no previous assents had been made. On page 35 it is said that 'this statement is not required in any assent unless the assent is given to a purchase for money or money's worth', and reference is made to Appendix V on page 131. Then on page 52 it is dogmatically stated (without any reference to Appendix V) that 'occasionally an assent recites that there has been no previous assent or conveyance, but this is quite useless'. In Appendix V there is a full discussion of the possible effects of the Administration of Estates Act, 1925, s. 36 (6), which deals with statements of no previous assents. The Appendix does indeed cast serious doubt on the meaning of the subsection, but it is submitted that the categorical statement that 'this is quite useless' is too strong in the circumstances.

It is interesting to note that the author takes the view that where a general grant of probate has been made to an executor and there is settled land and no reference is made to it in the grant, the executor can make a good title to the settled land without obtaining a limited grant or a grant expressly including settled land. This seems to be the generally accepted view.

Reference might have been made in several instances to authorities supporting the propositions stated, and surely the price of fifteen shillings seems unduly high.

D. H. P.

A First Book of English Law. By O. Hood Phillips. [London : Sweet & Maxwell, Ltd. 1948. xx and 271 pp. 16s.]

This book is intended as an elementary introduction to the study of English law. It comprises an introduction and three parts. The introduction (pp. 1–14) contains a brief survey of the characteristics of English law and of the principles on which English justice is administered. The points made in this introduction are important but many of them are made so tersely and are so advanced that it is difficult to imagine beginners not being thoroughly puzzled by them. A selection of the more advanced points would have been more likely to receive appreciation in a fuller chapter at the end of the book. Part I (pp. 15–69) contains an account of the various systems of courts, their composition and jurisdiction. Part II (pp. 70–172) deals with the sources of English law; and Part III (pp. 173–261) gives an outline of the main branches of English private law and includes a chapter on the law of persons.

A great mass of reliable information has been packed tightly within the covers of this work; and it may be questioned whether it would not have been better to pay more attention to presentation in a more interesting manner.

Here and there a difficult or obscure point is raised that could well have been passed over in an elementary work; for example, on page 219 the mention of a clause ousting the jurisdiction of the courts being void as against public policy, and on page 237 the reference to an infant being able to sue the other party to a contract for the sale of goods other than necessaries although the contract is declared to be void by statute. A few small errors have crept in; Greer L.J. is referred to on page 107 as 'Lord Greer, L.J.'; the reference (on p. 219) to the case of *Rose and Frank Co.* v. *Crompton* should be [1925] A.C. 261; and on the same page the facts in *Great Northern Ry.* v. *Witham* are made to revolve around 'coals' instead of 'stores'; on p. 235 it is said that an infant is not entitled to take a degree at a British university.

D. H. P.

Chitty's Forms of Civil Proceedings in the King's Bench Division of the High Court of Justice. Seventeenth Edition by **Percy J. Bowie, o.b.e.**, late of the Central Office of the Supreme Court. [London : Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. lii and 1139 and (index) 63 pp. £3 15s.]

The fact that this book has gone through seventeen editions shows how useful it is to the practitioner. Its bulk, however, emphasises the cumbrous nature of legal machinery when a book of forms, with the necessary notes to understand them, for one division of the High Court alone runs to 1,139 pages. The last edition ran to 1,115 pages and the increase of size is due to the introduction of new forms, including Orders of Mandamus, Prohibition and Certiorari, Writs of Habeas Corpus ad Subjiciendum, and Cases Stated at Quarter Sessions and by Magistrates. The new forms will be found very helpful, but it is a pity that one of them, the form of Special Case upon Order at Sessions at p. 914, should contain in its title the now obsolete 'Assessment Committee of the Poor Law Union in the County of —— and the Overseers of the Poor of the Parish of ——' as if the Local Government Act, 1929, and the Poor Law Act, 1930, had never been passed. In his preface the editor refers to the deletion of obsolete material. This, however, has not been carried far enough and there are several directions in which the new edition might have been improved by the omission of unnecessary matter in the interests both of economy of production and of convenience in use.

The contents of Chapter 9 consist entirely of forms in connection with 'actions against heirs and devisees on bond, etc., of ancestor'. These actions have long been obsolete and the retention of the forms serves no practical advantage. Again, on p. 719, there is a form of 'order to dispense with husband's concurrence in the disposition of property by wife'. Such an order can only be obtained when a woman married before January 1, 1883, wants to convey property she acquired before that date with the concurrence of her husband under the Fines and Recoveries Act, 1833, and such concurrence cannot be obtained because the husband is of unsound mind or from some other cause incapable of executing a deed, or his residence is unknown or he is in prison or living apart from his wife. It is obvious that such cases must be very rare indeed, and that the form, with its attendant notes, can safely be omitted. Similarly, pp. 1138 and 1139 are taken up with the form of an originating summons for leave to enforce an award of a mixed arbitral tribunal under the Treaty of Peace Act, 1919, and notes explaining the procedure. Another instance of forms which seem to have outlived their usefulness is to be found on p. 641, which contains a writ of summons and a fi. fa. against the inhabitants of a district. The inhabitants were formerly liable to pay compensation for damage to property caused by a riot but, as the note points out, this action must now be brought against the police authority, which is the county council, and not against the inhabitants. On p. 653 there are

three forms relating to 'proceedings by and against companies established by letters patent under the Chartered Companies Act, 1837'. Such companies had to register a deed of partnership and must be very rare owing to the great change in company law legislation since 1837.

Dower is the subject of Chapter 3 of Part 10, and forms are given of a writ of inquiry in dower on judgment by default, notice of execution of writ of inquiry, and inquisition thereon. Dower was abolished by section 45 of the Administration of Estates Act, 1925, as respects the real estates of persons dying after 1925, with the exception of the estates of lunatics or defectives who were of full age on January 1, 1926, and die after 1925 intestate without having recovered testamentary capacity. In the unlikely event of any of these forms being required today, a reference to the previous edition would surely have been sufficient. Chapter 3 of Part 9, 'Proceedings by and against Peers and Members of Parliament', seems hardly worth retaining.

Chapters 2 and 3 of Part 11 deal respectively with 'Cognovit or confession and proceedings thereon' and 'Warrant of Attorney and proceedings thereon'. In the first edition of Halsbury's *Laws of England,* which purports to state the law as at September 25, 1911 (Vol. 18, p. 190), there appears 'It was formerly a common practice for judgment to be entered up upon a warrant of attorney to confess judgment but the practice is now almost obsolete'. In the footnote (9) it is stated 'The practice of obtaining a judgment by a cognovit actionem or more shortly cognovit, by which the defendant confessed the action and suffered judgment to be at once entered up against him, is now quite obsolete'. Both these statements are repeated in the second edition (1935), vol. 19, p. 224, although in the lapse of time between 1911 and the present day it may seem that the practice of entering up judgment upon a warrant of attorney has changed from almost obsolete to quite obsolete. It reminds us of the conversation overheard by Mr. Pickwick while he was waiting at Dodson and Fogg's office in which Mr. Wicks describes the episode of one Ramsey coming in to discharge a debt and of Fogg's refusal to accept the money. 'The costs are quite safe for he's a steady man with a large family at a salary of five and twenty shillings a week, and if he gives us a warrant of attorney, as he must in the end, I know his employers will see it paid; so we may as well get all we can out of him, Mr. Wicks'.

Throughout the book there are numerous references to a work variously described as 'Pract. (14th ed.)' and 'Pr., 14th ed.', but nothing to indicate what the work is. It is worthy of consideration whether it would not be more convenient to number the chapters consecutively, rather than to divide the book into seventeen parts with the chapters separately numbered under each part.

When adding forms of award in the form of a special case, there could usefully have been included a form of an award in an alternative form, operating as a special case if set down within a specified time, but as a final award if not so set down, such as was approved by the Court of Appeal in *Olympia, etc., Co.* v. *MacAndrew* [1918] 2 K.B. 771.

In conclusion, attention may be drawn to Chapter 7 of Part 7 where some very sound advice is given as to the contents of a brief.

J. Charlesworth.

Contracts and Peace Treaties. The General Clause on Contracts in the Peace Treaties of 1947 and in the Peace Treaty of Versailles of 1919. By Pieter B. Drost, dr.jur.(Utrecht), ll.b.(Lond.), of the Rotterdam Bar. [The Hague : Martinus Nijhoff. 1948. 229 pp. fls. 6.90.]

The Treaties of Peace made in Paris in 1947 with Italy, Roumania, Bulgaria, Hungary and Finland contain some provisions relating to the fate of contracts

between Allies and enemies. It is the purpose of this book to discuss the effect of those provisions in so far as they are of general interest. They are put against the background of the Treaty of Versailles and the practice which was developed by the Mixed Arbitral Tribunals, but the author also looks forward by making suggestions for the Treaty of Peace which at some time may be concluded with Germany.

During the period after World War II the subject is perhaps not of very great practical importance, but in those few cases in which contracts affected by the Treaties will have to be considered, difficult questions will be bound to arise. To a large extent this is due to the fact that the text of the Treaties is not too satisfactory; it is with dismay that we learn from the author (who, however, gives no proof for his statement) that the relevant clauses of the Treaties are based on a British proposal (pp. 1, 80). The author's discussion is thorough and frequently very helpful and does not by any means lose value by reason of the fact that on many points it will leave readers unconvinced. Thus the influence which, for the purpose of construing the Treaties, the author attributes to municipal law is surely excessive. The suggestion (p. 57) that, in connection with the liquidation of enemy property, the nationality of corporations is determined by municipal law, because Art. 79 (2) of the Italian Treaty allows the Allied and Associated Powers to carry out the procedure of liquidation in accordance with their own laws, is plainly wrong. On p. 132 the author says that, where a contract is dissolved, the Treaties compel the refund of money paid in advance and thus lay down 'a rule of substantive law which supersedes any rule of domestic law', but that 'the municipal rules on abrogation and its effects will have to be consulted besides the general provision of the Treaties'. All that the Treaties did was to preserve the municipal rules on unjustified enrichment. On pp. 160 *et seq.* the author seems to have relied very heavily on Dr. Lipstein's learned papers in the *Transactions of the Grotius Society*; a more generous acknowledgment would have been merited.

F. A. Mann.

Administrative Law: Cases and Comments. By Walter Gellhorn, Professor of Law, Columbia University. Second Edition. [Brooklyn: The Foundation Press Inc. 1947. lxxxix and 1138 pp. $7.50 net.]

This work is a massive and remarkable exposition of judicial review of administrative action in the United States. It is no ordinary case-book. It includes a large number of extracts from books and articles on public law; and in his editorial comments, often pithy and suggestive and never dull, Professor Gellhorn contrives to place his selected materials in an intelligible context. The documentation is astonishingly full; it is difficult to believe that any significant American case or legal article can have escaped his attention. The Federal Administrative Procedure Act and the Report of the Attorney-General's Committee on Administrative Procedure are woven into the text. The provisions of the Act and its legislative history are set out at the end of the book.

No English student of public law can afford to ignore the book, and it is to be hoped that every important law library in the country will acquire it. But it must be conceded that most English readers will be at a disadvantage when using the book. In the first place, they may lack that knowledge of American constitutional law which is necessary for a full appreciation of the grounds for judicial review. Secondly, they may be unfamiliar with the main features of the administrative process in the United States. It is important to know what federal administrative agencies must not do, but it is more important to know what they can do and how they do it. Despite Professor Gellhorn's brilliant treatment of his subject, his book remains essentially a

case-book, and a case-book is not a textbook. The powers, organisation and procedures of the various administrative agencies are described only incidentally, if described at all; the main emphasis is upon judicial pronouncements defining the minimum requirements of a fair hearing before an agency. No doubt this emphasis enhances the value of the book for American law students, who will want to know how to advise clients desirous of taking their disputes with administrative agencies into the courts of law. To the foreign reader, on the other hand, it means that the book cannot be used as a first introduction to American administrative law.

For comparative purposes, perhaps the most useful chapters are those on delegated legislation and remedies against the Administration. In dealing with delegated legislation Professor Gellhorn discusses some of the English safeguards, but he seems to be unaware of the Statutory Instruments Act, 1946, and the House of Commons 'Scrutinising Committee'.

S. A. de Smith.

Death Duties. By K. McFarlane, ll.d., of the Estate Duty Office. [London : Stevens. viii and 128 pp. 4s. net.]

This work is one of the excellent *This is the Law* series whose aim is to give the layman an outline of the law in a readable and concise form. Though intended chiefly for executors and trustees, it should serve as a useful introduction for the student both of law and accountancy.

The experience he has gleaned in his official duties—though the work is quite 'unofficial'—has enabled Dr. McFarlane to make this most abstruse subject as intelligible for the layman as is possible. The most interesting of the first ten chapters are the sections on 'General Liability', 'How are the Duties calculated' and 'Who pays ?'. The last chapter contains thirty *practical* examples of the incidence of the Duties on various types of estates and bequests and should enable any beneficiary to understand the nexus between his net cash benefit and the gross bequest in the will—the former so often falls short of the latter owing to liability to Estate, Legacy or Succession Duty!

The layman, brought in contact with liability to the Death Duties for the first time, would be well advised to peruse this work to enable him to decide whether to seek expert professional advice.

A. F.

The Special Contribution or Capital Levy under the Finance Act, 1948. By J. H. Munkman, ll.b., Barrister-at-Law. [London : The Solicitors' Law Stationery Society, Ltd. 1948. v and 39 pp. 3s. 6d. net.]

This booklet is an account, in narrative form, of the provisions of the Finance Act, 1948, dealing with Sir S. Cripps' 'once and for all' 'Capital Levy', see discussion at 10 M.L.R. 420–3. The account is enlivened by arithmetical examples to illustrate the incidence of the tax, which have been prepared by Mr. Kenneth Child, A.C.A. Mr. Munkman's explanation, though brief, is clear but he seems to have made a serious slip in the Chapter (VIII) dealing with Domicile and Residence. He there states (p. 34) that the Income Tax cases on 'residence' would not be conclusive, for purposes of the new tax, as to the meaning of 'ordinary residence' because the latter term is 'used in an entirely different context from that of the Income Tax Acts'; it is submitted that the courts would apply the same principles as respects the Special Contribution as they have for Income Tax, having regard to section 68 (3) of the Act which provides that expressions in Part V of the Act 'have the same meanings as in the Income Tax Acts' unless *expressly* provided otherwise.

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